(29,065)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 515.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, AND L. L. BARTHER, TRUSTEES, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND AMERICAN WHOLESALE LUMBER ASSOCIATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Record from U. S. district court for the northern district of Illinois	1	1
Caption	1	1
Bill of complaint	3	3
Report of Interstate Commerce Commission, February 11, 1922	14	15
Orders of Interstate Commerce Commission, February 11, 1922	30	31
Order amending bill of complaint	40	41
Motion to dismiss bill of complaint	42	42
Order sustaining motion and dismissing bill	47	43
Petition for appeal	50	45
Assignment of error	53	46
Order allowing appeal and fixing bond	59	49
Bond on appeal	61	50
Præcipe for transcript and service	63	51
Clerk's certificate	67	52
Citation and service on Interstate Commerce Commission	68	53
Citation and service on United States of America	70	54
Citation and service on American Wholesale Lumber Ass'n.	72	55

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1922.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable George T. Page, Circuit Judge of the Seventh Judicial Circuit, holding United — District Court for the Northern District of Illinois by assignment, Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, and Honorable Ferdinand A. Geiger, District Judge for the Eastern District of Wisconsin, holding United States District Court for the Northern District of Illinois, by assignment, on Thursday, the fifteenth day of June, in the year of our Lord one thousand nine hundred and twenty-two, being one of the days of the regular June Term of said Court, begun Monday, the fifth day of June, and of our Independence the 147th year.

Present:

Honorable George T. Page, Circuit Judge.
Honorable George A. Carpenter, District Judge.
Honorable Ferdinand A. Geiger, District Judge.
Robert R. Levy, U. S. Marshal.
John H. R. Jamar, Clerk.

2 In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff-,

vs.

THE UNITED STATES, Defendant.

Be it remembered that heretofore, to-wit: on the 11th day of May, 1922, came the above named complainant, by its solicitors, and filed its bill of complaint, as follows:

IN THE DISTRICT COURT OF THE UNITED STATES NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees,

PLAINTIFF

vs.

THE UNITED STATES,

DEFENDANT

IN EQUITY

BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS

The Plaintiff, EDWARD HINES YELLOW PINE TRUSTEES, presents its Bill of Complaint against the defendant, The United States, and for cause of action says:

First. The Plaintiff, the Edward Hines Yellow Pine Trustees, a common law trust, having its principal office in the City of Chicago, State of Illinois, has been for some years past and is now engaged in operating a lumber manufacturing enterprise in the Southern part of the State of Mississippi and is just completing a railroad between the cities of Lumberton and Kiln, Mississippi, which railroad the plaintiff intends operating as a common carrier of freight by railroad within the State of Mississippi, by virtue of which it will, in certain matters, become subject to the provisions of the various acts of Congress, known as An Act to Regulate Commerce, approved February 4, 1887, and in effect April 5, 1887, as amended by various subsequent acts; that under Sections Four and Five of the Act of June 18, 1910, known as the Commerce Court Act, and under the Urgent Deficiency Appropriations Act of October 22, 1913, (38 Stat. L.219), all cases and proceedings which, but for the acts just cited would be brought against the Interstate Commerce Commission, shall be brought against the United States as defendant, and that this is an action brought to enjoin and set aside and annul in part an order of the Interstate Commerce Commission, and, therefore, under the said acts, necessarily brought against the United States.

Second. This case involves a question arising under the Constitution and laws of the United States, and particularly under the said Interstate Commerce Act, comprising An Act to Regulate Commerce, approved Feb-

ruary 4, 1887, and in effect April 5, 1887, and the various acts amendatory thereof and supplementary thereto, and the amount involved is in excess of Three Thousand Dollars ($3,000). The action is of a civil nature and is brought in the Northern District of the State of Illinois, because under the Act of October 22, 1913, hereinbefore referred to, the venue of any suit brought to suspend or set aside any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made. The order which this suit is brought to suspend was made upon the petition of the American Wholesale Lumber Association, a voluntary, unincorporated association having its office, legal residence and place of business in the City of Chicago, in the State of Illinois, within the jurisdiction of the District Court of the United States for the Northern District of Illinois; that Edward Hines, C. F. Wiehe and L. I. Barth, are the duly appointed operating Trustees of the Plaintiff.

Third. That the Trustees of the Plaintiff are also directors in corporations manufacturing lumber in other parts of the United States and also directors of a corporation engaged in wholesale selling of lumber with headquarters in the City of Chicago, which company also operates a number of retail yards in the City of Chicago; that one of the manufacturing plants in which the Trustees of the plaintiff are directors, manufactures Hardwood and Hemlock in Wisconsin, while the plaintiff itself manufactures in Mississippi, Yellow Pine and the corporation which operates wholesale and retail lumber sales business in the City of Chicago, of which corporation the Trustees of the plaintiff are directors and officers, purchases and sells not only Hardwood and Hemlock and Yellow Pine, but also White Pine, Western Pine, Fir, Spruce, and in fact practically all varieties of Hardwood and Soft Woods used for lumber, and that the said Trustees of the plaintiff have each been actively engaged in the lumber business for many years and are familiar with the said business in all its phases; that the business is highly competitive, both among the manufacturers of the same species and among the species themselves, and among the wholesalers, and even among the retailers doing business in the same city; that among the customers to whom manufacturers sell are not only retail yards but large industries which use lumber as a component part of their manufactured and finished product; that at and during the time of the World War, there were withdrawn particularly from the industries which are the customers of lumber manufacturers a large part of their men experienced in knowledge of the grades of lumber, and skilled in tallying it upon its receipt by such industry, many of which men have not returned to their former employment, and their places have been either not filled at all, or have been filled in some instances by men less well trained and in some instances by men not thoroughly loyal to their employer; that, on the other hand, owing to the highly competitive character of the lumber business there has developed in the last few years a group in the lumber business who can best be classed as speculators, in that they do not own manufacturing plants or yards for the storage of lumber for wholesale purposes, or yards from which lumber is sold at retail, but maintain offices for the purpose of buying from manufacturers and selling to others, and without any particular investment or interest in the lumber business, or its future; but simply a use of the lumber industry as a means of making money by speculating in its product. Speculation in lumber finally led to fraudulent practices, some of which came to the knowledge of the plaintiff and were described by one of the Trustees of the Plaintiff in an address by him before a meeting of the Southern Pine Association held in the City of New Orleans, March 29,

1922, in the following words:

"Let me give you a few concrete examples of the bad practices. In calling them bad practices, I am using a very mild term. The situation was aggravated largely during the war, and also since the war. Why? During the war labor was drawn away and naturally expert labor—reliable labor—was difficult to obtain as the demand for it was great. In many industries, particularly railroad companies, and in various factories that have occasion to manufacture lumber, the help that counted, tallied and graded the material received was drawn into the war or accepted a more lucrative position, so that these interests were unable to get skilled labor. Naturally these industries and factories grew careless about tallying and grading their lumber, and a certain percentage of firms classing themselves as wholesalers, particularly those located in larger cities and making a specialty of industrial trade, made it their business to ascertain the methods employed by these industries in the unloading, grading, tallying and measuring the lumber, and quickly selected those that had poor systems for checking and grading lumber shipped in, and in some cases corrupted the receiver of the lumber by paying him so much per car to accept the extra fictitious footage or wrong grade. The wholesaler would buy carloads of certain kinds of lumber, and in rebilling would change the footage.

"You will be surprised at some of the instances of this practice I can enumerate. I know of one case in Chicago, where for over a year the footage in practically every car was raised 10,000 feet. Then by changing the grade, by connivance with the purchasing department so that the sawmill operator figured on only one grade, at a price of $55 Chicago (the market at that time), the commission man shipped lumber which he had purchased at $36.00 a thousand. Thus he first cleaned up $550 on the fictitious 10,000 feet to a car (at $55 a thousand); and, on the same car he made the difference between $36 and $55, or $19 a thousand, which on a car of 25,000 feet, figuring $350 in the overbilling, and $475 on the changed grades, amounted to $1,025 a car. Disclosures since have shown that in one year and on one contract this amounted to a clean-up of $105,000, and this from one of the most reputable concerns in its line of business in the vicinity of Chicago.

"You seem astonished. Gentlemen, I have the photographs of a number of invoices shipped from certain mills, as well as photographs of the wholesaler's invoice covering the same cars. Our company had the contract the year preceding and gave the concern in question a certain grade of lumber on the basis of a fair market price for that particular grade. The next year we were met by the purchasing agent and told that our prices were very much out of line; so we lost the contract, and by accident, we made an investigation, which disclosed the above mentioned facts. These were then placed before the Vice-President of the concern with the request that he substantiate our verbal

statements. We made our statements based on the facts and presented such pertinent information that when we asked for it, he gave us a list of the cars bought, together with the contents as billed to his concern. We traced the cars back to their source, and ascertained from the reputable manufacturer just what he had been ordered to ship and what he had actually invoiced to the wholesaler. I personally saw numerous invoices of the wholesaler, and in every case the wholesaler was found to have overbilled 10,000 feet, plus the profit gained by ordering one grade from the manufacturer and billing it as another."

That at the same meeting, Mr. William S. Dickason, a prominent retailer with headquarters in Kansas City, Missouri, spoke of the same evils in the following terms:

"The retail dealers condemn speculation in lumber, and the jobber and wholesaler who indulge in it and those manufacturers who, while soliciting the retail dealers' patronage, sell large blocks of regular yard stock to those speculators, thereby closing the market to the retailers. A transfer of ownership does not increase demand nor diminish supply, but the buyer holds at mill or in transit and exacts a profit without rendering a service or creating any value. We recognize that there are legitimate jobbers and wholesalers, and in a legitimate field they are absolutely necessary to the lumber and building industries, and we approve of them, and I refer only to the speculators—those who buy round numbers of cars of stock that is scare, when the supply does not equal the demand and hold for an unfair and unreasonable price. It brings forth just criticism from the public, from which we all suffer. Last fall when the demand of B. flooring was greater than the supply, and prices were soaring, manufacturers sold straight cars to jobbers who put them in transit and were able to exact exorbitant profits, and one manufacturer I know sold some cars advanced his prices within ten days after and limited shipments to 5,000 feet a car. A salesman said recently that he was unable to compete with stock from his own mill offered by a jobber who had bought it sometime previous, that the mill was short of these items and the mill had advanced its prices and the jobber was taking the business and making a profit."

And that their existence is so well recognized that on the following day the Association, in order to meet the practices referred to, adopted by unanimous vote, the following resolutions:

"(1) The Committee recommends the grademarking of lumber as a means of protecting lumber buyers.

(2) The Committee recommends that lumber be marked with the name of the grade or such abbreviation thereof as it may be practicable to use.

(3) The Committee recommends that the number of the mill, to be designated by the Southern Pine Association, be shown on the lumber in connection with the grade mark.

(4) The Committee recommends that the Board of Directors authorize the Secretary-Manager to solicit suggestions for mechanical or other means of stamping, printing or impressing grade marks upon manufactured lumber.

(5) The Committee recommends that the Board of Directors be requested to obtain the opinion of counsel to ascertain whether or not the Southern Pine Association can legally recommend the adoption by its subscribers of symbols or grade marks, to be used by them in connection with marks designating the number of the mill and the grade.

(6) The Committee recommends that the Directors instruct the Secretary-Manager to address an inquiry to the Association subscribers asking whether or not they will be willing to adopt the practice of grade marking.

(7) The Committee recommends that when 50 per cent of subscribers shall have indicated their willingness to join in the movement of grade marking lumber for the protection of the buyer, that the Directors authorize the issuance of a list of such mills in alphabetical order showing the number assigned to each mill and to furnish such list to all buyers of lumber.

(8) That subscribers be urged to place in each car of lumber loaded by them a card showing tally by piece and grade of the material loaded therein.

(9) That buyers, when desiring to ascertain the mill by which a certain shipment of grade marked lumber has been made may apply to the Association for the same."

That the matter had also been brought to the attention of the Department of Commerce with the result that the head of the Department of Commerce, Herbert Hoover, in a public speech in the City of Chicago, on April 4, 1922, said:

"Let us take a single material—Lumber. Several leading manufacturers inform me that the time has come when we must have a guaranty against short deliveries and fraudulent alteration of qualities. The product of the honest millman must reach the consumer as the manufacturer wishes his product to reach the consumer. Also, he must have protection from the crooked competitor. Is it not possible for the National Lumber Manufacturers' Association to take upon itself the duty of giving a brand to lumber that will show its content and grade? Many commodities are assured as to quantity and grade under the inspection and rules of our voluntary trade associations. If you think it wiser to do so we could probably secure the enactment of a 'pure food law' in all building materials. I would much rather see the trades themselves establish their own standards."

And that on the 5th day of April, 1922, the National Lumber Manufacturers' Association at its annual meeting in the City of Chicago, endorsed the position of Secretary Hoover, and adopted resolutions, part of which are as follows:

"Your Committee recommends the adoption . . . of the following principles:

(1) The grade marking of lumber as a means of protecting lumber buyers.

(2) Marks in connection with the grade marking by which the mill manufacturing and shipping the lumber can be identified through the association to which it belongs.

(3) The placing in each car of lumber by the mill shipping such lumber of a card giving a piece tally of the grade or grades of the lumber contained in such car.

(4) Simplification and standardization of sizes which, while being fair and equitable to all producers of lumber, will eliminate the waste incident to unnecessary, confusing and conflicting sizes.

(5) The rigid maintenance of grades (and of standard sizes, if established) through Association inspection and action."

And that on the 6th and 7th days of April, 1922, there was held in the City of Chicago, a well-attended meeting of lumbermen, comprising representatives of the manufacturers, wholesalers, and retailers of lumber, which meeting formed itself into a permanent organization to be known as the American Lumber Congress, to be comprised in membership of one-third lumber manufacturers, of one-third wholesalers, and one-third retailers of lumber, which said American Lumber Congress in connection with its organization also adopted resolutions on this subject, as follows:

"Your Committee recommends the adoption of the following principles:

(1) The grade marking of lumber, as a means of protecting lumber buyers.

(2) Marks, in connection with the grade marking, by which the mill manufacturing and shipping the lumber can be identified through the Association to which it belongs.

(3) The placing in each car of lumber by the mill shipping such lumber of a card giving a piece tally of the grade or grades of lumber contained in such car.

(4) The rigid maintenance of grades through association inspection and action.

(5) We believe in fair dealing, honest grades and the proper fulfillment of all obligations and contracts."

That while the dishonest, speculative element in the lumber industry is highly dangerous, its activities are confined to a comparatively small number of individuals and firms; that one of the instrumentalities which lends itself to the practices condemned by the Southern Pine Association, Secretary Hoover, the National Lumber Manufacturers' Association and the American Lumber Congress, is what is known as the Transit Car, which means, briefly: That a carload of lumber is shipped from the manufacturing plant with no customer and in the hope that a customer may be obtained before its arrival at the destination to which it is first consigned; that the reasons that a transit car lends itself readily to the

frauds which have been condemned by the entire lumber industry are the following: The invoice to the ultimate customer is not made by the mill whose employees have loaded the car, which makes it more easy for the person making the invoice to misdescribe the grades, and also to misstate the number of feet in the car. It is difficult to inaugurate such a practice at a manufacturing plant because of the inspection constantly maintained by Associations, and because of the fact that false grades and false tallies would demoralize the employees of the manufacturing plant, whereas, a false invoice from the office of a dishonest speculator cannot demoralize an institution maintained for improper and dishonest uses; that the Transit Car also is an improper interference with the great volume of the lumber business which flows naturally from the lumber manufacturer on the one hand to the retail dealer and large industries on the other, which retailers and large industries being obliged to make calculations in connection with customers and manufacturers are entitled to the ordinary and usual use of the equipment of the railroads, which in times of car shortage is interfered with by the Transit Car, as, at such times those who own the transit cars when prices are advancing keep the cars on the rails without delivery until in their opinion the highest price obtainable has been reached, which practice deprives the great bulk of the lumber industry of the legitimate use of railroad equipment, to which it is entitled for the ordinary and usual processes of the industry; that there are two general classes of mills in the lumber industry, the large mill (to which class both mills of the plaintiff belong) which cuts ten million feet and over annually and the small mill which cuts less than that amount. According to the latest available statistics there were in the United States in 1918, 785 large mills, and 21,781 small mills, constituting four and ninety-six per cent respectively of the total number of mills. These produced sixty and forty per cent respectively of the total lumber. The proportion of large mills to small mills is increasing not only because the large mills purchase large tracts of timber which will provide operations for a number of years, but because such large mills in obedience to the widespread demand for conservation of timber have connected with them planing mills, for the manufacture of siding, roofing, lining for railroad cars, etc., cutting up plants for the manufacture of short lengths for boxes, broom handle factories for the manufacture of broom handles and other plants for the utilization of those portions of the log and the lower grades of timber which are necessarily wasted by the small mill. The small mill is frequently a portable mill which can be moved from one place to another and cut small tracts of timber not advantageously situated for a large mill. The transit car hereinbefore referred to is particularly disastrous to the small mill owner. Usually such an owner has only a small amount of capital and necessarily disposes of his lumber largely through commission men. When the owner of the small mill is induced to ship his lumber in a transit car he places himself at the mercy of the commission men, if such commission man happens to be unscrupulous, and must accept in the distant market whatever price the commission man sells his lumber for. It has happened to the knowledge of the plaintiff in the year 1921, during which year the demand for lumber has been small, that such transit cars carrying the lumber of the small mill man have been disposed of in the City of Chicago at a price scarcely above the amount due for freight on the shipment. It is only when the small mill man is induced to ship his lumber on the transit car that he stands the chance of so disastrous a loss at the hands of a commission man whose sole interest in the transaction is his commission.

Fourth. That with the knowledge of these facts the Director General of Railroads on October 20, 1919, at a time when the majority of the railroads of the United States were being operated through and by the Director General of Railroads, instituted the so-called Penalty Charge of $10.00 per car for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment at the point to which they were originally consigned beyond 48 hours after the hour at which free time began to run under the demurrage rules in force on the respective railroads. When the railroads returned to private control on March 1, 1920, this penalty charge was continued from time to time until January 1, 1921, and on December 2, 1920, the various railroads filed with the Interstate Commerce Commission schedules to continue the Penalty Charge after January 1, 1921, without expiration date. These schedules, although protested, were permitted by the Interstate Commerce Commission to go into effect. On September 10, 1920, a voluntary association known as the American Wholesale Lumber Association, filed its complaint with the Interstate Commerce Commission, known as No. 11818 against this Penalty Charge, and on the 11th day of February, 1922, the Interstate Commerce Commission made its decision in writing a copy of which is attached hereto and marked Exhibit A.

Fifth. That among other things the Commission found as follows:

"A railroad's function is to move traffic. The furnishing of storage is not a primary function. The free time provided for loading, unloading and reconsignment has been fixed as the reasonable time within which cars should be released and made available for further movement. The shipper has no inherent right to detain a car beyond the free time, and thus prevent it from being used for transportation by other shippers. Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation, the carriers are justified in taking steps to prevent such abuses.

"We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars, and generally speaking no congestion in the country. In the past, car shortages at time have followed quickly upon periods of car surplus. It is impossible to forecast the continuance of present conditions, or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue it is and will be unreasonable.

"The respondents in the suspension case have justified the cancellation of the penalty charge.

"It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant."

And that it is Ordered,

"That the above named defendants be, and they are hereby notified and required to cease and desist, on or before March 13, 1922, and thereafter to abstain, from publishing, demanding, or collecting the penalty charge of $10 per car per day on lumber and other forest products held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules."

Sixth. That in and by its order based upon its decision

"There is now a large surplus of serviceable, empty cars, and generally speaking no congestion in the country,"

the said Interstate Commerce Commission prevented the railroads from taking necessary steps to join the great bulk of the lumber industry in the suppression of the evil and dishonest practices which have been heretofore referred to and set out; that in addition, the Commission held, which it was not within its jurisdiction to hold, that it had the right to prevent the railroad companies from charging a rental for their idle equipment, which was not being used, and which had then no present prospect of being used in connection with its business of transportation, and that it further held, which it had no right to hold, that the mere fact that railroad equipment was idle and without prospect of then present use in connection with its function of moving freight permitted any person who had theretofore engaged such equipment for the purpose of traffic and transportation to continue to use it without payment to the railroad company, for warehouse and storage purposes; that the Commission is without jurisdiction to compel a railroad company to refrain from the use of sufficient means to prevent its equipment being used for storage and warehouse purposes; that the said Interstate Commerce Commission by its said order also compels the railroad company to lend its equipment to unfair competition in the following manner: There is on all cars not immediately accepted by their consignees a demurrage charge, but in the instance of wholesale lumbermen, such as the corporation of which the Trustees of the plaintiff are directors, it pays the demurrage charge with the car shifted from the tracks of the railroad company and on the company's unloading track; that in the case of consignees who do not have unloading tracks of their own the car is taken from what are known as "holding tracks" of the railroad, which are the active tracks, and placed upon a side track known as the "public track," or "team track," and in both instances after they are so placed the car requires no further effort or attention from the railroad company until it is unloaded; but that in the case of a speculators car, such car is kept on what are known as "holding tracks" which are active tracks of the railroad company, and is shifted in the yards daily in the making up of trains, and is kept in a position where if an order comes to a wholesaler such as the corporation of which the Trustees of the plaintiff are directors, or a retailer whose car is on the public track, and the same order comes to a speculator, all on the same day, the speculator can promise, because his car is on the active tracks of the railroad, quicker delivery than either the wholesaler or the retailer by an average of 48 hours, but the demurrage charge which the wholesaler, the retailer, and the speculator pays is the same in all three instances.

Seventh. That in connection with its railroad between Lumberton and Kiln, in the State of Mississippi, the plaintiff owns locomotives and freight cars and other railroad equipment which will be used upon said

railroad, and that as to such equipment for any purpose not inconsistent with transportation, the plaintiff claims the right to the entire custody and control and use of such equipment for any purpose not inconsistent with transportation at a time when it is not required for transportation, and that the principle of the order of the Interstate Commerce Commission of February 11, 1922, if carried to its logical conclusion will compel the plaintiff to permit any person who comes lawfully into possession of any of the equipment of the plaintiff for purposes of transportation to thereafter retain it for another purpose, provided the plaintiff did not require such equipment for transportation, which finding plaintiff alleges is in violation of its constitutional right to the use of its own property, and particularly in violation of the fifth amendment to the Constitution of the United States.

Eighth. That, by its said order of February 11, the Interstate Commerce Commission is assisting in the continuance of evils in the lumber industry, injurious alike to the manufacturer, the wholesaler, the retailer and the consumer, and is compelling the railroads of the country to refrain from assisting the Department of Commerce and the Lumber Industry in fighting these evils; is compelling the railroads of the country to lend themselves to speculation of a character which in turn lends itself easily to fraud and deception upon the lumber consumer; is compelling the railroad companies to permit the use of their equipment for storage and warehouse purposes without accepting charge for that use, and is compelling the railroad companies to permit the speculative element to compete with the wholesaler and the retailer who have large investments in business on a basis unfair to the wholesaler and retailer and particularly advantageous to the speculator at the same charge to the speculator as is charged to the wholesaler and retailer.

Ninth. Plaintiff further shows that said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because not within any jurisdiction granted the Interstate Commerce Commission under an Act to Regulate Commerce, approved February 4, 1887, or any act amendatory thereof or supplementary thereto conferring jurisdiction on the Interstate Commerce Commission.

WHEREFORE, as it is without adequate remedy at law for its protection in said matter, plaintiff prays that the said order of the said Interstate Commerce Commission of February 11, 1922, in the proceeding of the said Interstate Commerce Commission known as Docket 11818, be set aside and that all proceedings thereunder be enjoined; that pending the issuance of a perpetual injunction herein, this Honorable Court may grant an Interlocutory Injunction herein, restraining the said defendant, its agents, servants and each of them from doing any act under and by virtue of the said hereinbefore mentioned order until the final hearing, or the further order of this court; and that before the hearing and determination of plaintiff's application for an interlocutory injunction, this Honorable Court may grant a temporary restraining order, restraining said defendant, its agents and servants, and each of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for interlocutory injunction herein.

Plaintiff prays not only a writ of injunction conformable to the prayer, but also that a subpoena of the United States issue out of and under the seal of this Honorable Court directed to the defendant, the United States, thereby commanding it on a day certain therein to be named, to be in and appear before this Honorable Court, then and there to answer (but

not under oath, answer under oath being hereby expressly waived), all and singular the premises, and to conform to and abide by such order, direction or decree, as may be made in the premises, and that on final hearing thereof said order of injunction may be made perpetual, and for such other relief as to Your Honors may seem meet and the plaintiff will ever pray.

EDWARD HINES YELLOW PINE TRUSTEES,

By L. L. BARTH.

WILLIAM S. BENNET,
HOMER J. SMITH,
EDWARD W. MCGREW,
Solicitors.

Chicago, Illinois.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

L. L. Barth, being duly sworn, on oath, says that he is Vice-President of Edward Hines Yellow Pine Trustees, plaintiff, and as such is authorized to make this affidavit in its behalf; that he has read the above and foregoing Bill of Complaint and knows the contents thereof, and that the same is true in substance and in fact.

L. L. BARTH.

Subscribed and sworn to before me this 17th day of April, 1922.

IVAN H. NELSON,
Notary Public, Cook County, Illinois.

My commission expires July 30, 1924.

7418

INTERSTATE COMMERCE COMMISSION.

No. 11818.[1]

AMERICAN WHOLESALE LUMBER ASSOCIATION

v.

DIRECTOR GENERAL, AS AGENT, ABERDEEN & ROCKFISH RAILROAD COMPANY ET AL.

Submitted February 1, 1922. Decided February 11, 1922.

1. Charge of $10 per day on cars of lumber held for reconsignment beyond 48 hours after 7 a. m. of day following notice of arrival found not to have been unreasonable or otherwise unlawful. However, under present conditions with a great number of idle freight cars, and an entire absence of congestion throughout the country, the charge is, and while present conditions continue will be, unreasonable.
2. Reductions proposed by the Chicago, Peoria & St. Louis in reconsignment charges on lumber found not justified and its suspended schedules ordered canceled. Other suspended schedules found justified.

Davies & Jones and *Edward A. Haid* for complainants.

George B. Webster for Associated Cooperage Industries of America, and *B. T. Bailey* for Central Wisconsin Supply Company, interveners in behalf of complainants.

Brown & Boyle, L. C. Boyle, W. J. Duffey, Geo. N. Brown, W. E. Gardner, F. M. Ducker, Frank Carnahan, and *J. C. Knox* for National Retail Lumber Dealers Association, Georgia-Florida Saw Mill Association, Michigan Hardwood Manufacturers' Association, North Carolina Pine Association, Northern Hemlock & Hardwood Manufacturers' Association, District No. 1 Ohio Association of Retail Lumber Dealers, Buffalo Lumber Dealers Association, White Pine Association of the Tonowandas, East Side Lumber Trade Exchange, St. Louis Lumber Trade Exchange, Southern Pine Association, California Redwood Association, Southern Cypress Manufacturers' Association, Retail Lumber Dealers Association of the State of New York, and

[1] This report also embraces subnumbers in Docket No. 11818 as follows: Sub-No. 1, Van Cleave Saw Mill Co. *v.* Director General, as Agent; No. 2, Geo. W. Miles Timber & Lumber Co. *v.* Same; No. 3, Berthold & Jennings Lumber Co. *v.* Same; No. 4, Robt. Kamm Lumber Co. *v.* Same; No. 5, Nicola, Stone & Myers Co. *v.* Same; No. 6, Myers-Parsons Lumber Co. *v.* Same; No. 7, Union Wholesale Lumber Co. *v.* Same; No. 8, Burnaby Bros. Lumber Co. *v.* Same; No. 9, Chicago Lumber & Coal Co. *v.* Same; No. 10, South Arkansas Lumber Co. *v.* Same; No. 11, W. T. Ferguson Lumber Co. *v.* Same; No. 12, Gloor-Oatmann Lumber Co. *v.* Same; and No. 13, Western Lumber Co. *v.* Same; also Investigation and Suspension Docket No. 1421, Penalty Charge on Lumber Held for Reconsignment.

89978—22

West Coast Lumbermen's Association, interveners in behalf of defendants.

George R. Allen, John F. Finerty, Andrew P. Humburg, Parker McCollester, Royal T. McKenna, and *Marion B. Pierce* for defendants.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Exceptions were filed by complainants and by interveners, representing cooperage-stock interests, to the report proposed by the examiner. Replies to the exceptions were filed by defendants and interveners opposing the complainants, and oral argument was had.

Complainant in No. 11818, an organization composed of 325 wholesale distributors of lumber, attacks as unreasonable, unjustly discriminatory, and unduly prejudicial the so-called penalty charge of $10 per car for each day or fraction thereof that cars, loaded with lumber and other forest products, are held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules. In the subnumbered dockets we are asked to award reparation against the Director General of Railroads on shipments upon which the charge was collected during federal control. The allegations in those complaints are substantially the same as the allegations in No. 11818. By agreement between the parties the evidence was directed solely to the lawfulness of the charge. Various lumber and lumber products manufacturers' and dealers' associations were permitted to intervene, some on behalf of complainants and others on behalf of defendants.

Investigation and Suspension Docket No. 1421 involves the proposed cancellation of this penalty charge by the Toledo, St. Louis & Western, the Chicago & Alton, the Chicago, Peoria & St. Louis, the Chicago & Eastern Illinois, the Kansas, Oklahoma & Gulf, the Kansas, Oklahoma & Gulf Railway of Texas, and the Okmulgee Northern Railroad. At the hearing counsel for the Chicago & Eastern Illinois stated that his road had filed an application to cancel the tariff under suspension and thereby to restore the penalty charge. The Chicago, Peoria & St. Louis also proposes to cancel the $3 reconsignment charge on lumber when instructions are received prior to arrival of car, and to reduce the charge from $7 to $3 when instructions are received after arrival of car.

Protests against the cancellation of the $10 charge were filed by the National Retail Lumber Dealers Association and the Southern Pine Association, composed of lumber manufacturers and retail lumber dealers. The complainant in No. 11818 intervened in behalf of

respondent. The schedules proposing these changes were suspended by us until March 14, 1922.

The penalty charge applied originally on lumber only, and was established by the Director General on October 20, 1919. The schedule naming the charge stated that it was "to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." On December 1, 1919, it was published in the uniform demurrage tariff, and was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel or crate material, and other forest products not further finished than sawed or dressed, and on all forest products on which the lumber rate applies. All these commodities will hereinafter be termed lumber. Prior to August 19, 1920, the penalty charge was applied on cars held on Sundays and legal holidays. On that date the charge was made subject to the provisions of the national car demurrage rules which provide that Sundays and legal holidays shall be excluded in computing time. By tariff supplement effective February 29, 1920, the penalty charge was made to expire June 1, 1920, and by later schedules extended so as to expire with the close of business January 1, 1921. On December 2, 1920, schedules were filed to continue the penalty charge after January 1, 1921, without expiration date. These schedules were protested by complainant and others, but we permitted them to go into effect.

There are two general classes of mills in the lumber industry, the large mill, which cuts 10,000,000 feet and over annually, and the small mill, which cuts less than that amount. In 1918 there were 785 large mills and 21,781 small mills, constituting 4 and 96 per cent, respectively, of the total number of mills. These produced 60 and 40 per cent, respectively, of the total lumber.

The large mills purchase large tracts of timber which will provide operations for a number of years. Such mills are equipped with modern machinery, have large yards, in most cases, where lumber can be graded and piled according to quality and size, and generally operate planing mills for the manufacture of siding, roofing, lining for railroad cars, etc. Some of them have their own sales organizations and maintain retail yards.

Generally the small mill is portable; it can be operated on one tract for a few years and then removed to another. It usually follows the large mill and cuts small tracts of timber which have been left, or goes back over cut-over lands and small areas that the large mill could not reach. The small-mill operator usually has only a small amount of capital, and, except for such stock as may be sold locally, disposes of his lumber largely through wholesalers,

who often advance money for the stumpage and sometimes for the pay roll for manufacturing. In such instances they retain title to the stumpage as security, and they have the mill load the lumber as early as possible.

When loaded, the mill bills the lumber to the wholesaler at a reconsignment point and receives an advance against the shipping documents. Upon arrival of the car at the reconsignment point the local agent notifies the consignee. The tariffs permit one reconsignment on lumber and the demurrage rules allow 24 hours free time on cars held for reconsignment. As stated, the penalty charge does not begin to accrue until 48 hours after the hour at which free time begins to run. Upon receipt of the invoice from the mill the wholesaler lists the car in his transit list. These lists are issued triweekly, and are circulated among the trade in an effort to secure purchasers for the shipment. A corrected list giving information as to the cars sold is sent to the wholesaler's salesmen daily. If any of the unsold cars on the list have been reported as reaching the reconsignment point, the salesmen are instructed to give such cars immediate attention. Moreover, night telegrams are sent to salesmen and dealers in an effort to secure immediate sales.

Complainants point out that the charge was originally established by the Director General as a "penalty for detention of equipment" and contend that he had no authority to establish a penalty. The federal control act provides:

> That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission. * * *
>
> Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just * * *.

It is complainants' position that this language did not give power to the President or the Director General to assess a penalty; and that Congress could not have given either of them that power because the imposition of a penalty is a legislative function which can not be delegated.

We are of opinion that the Director General was authorized to inaugurate any reasonable and just regulation and practice which he might find necessary to eliminate the abuse of excessive and unreasonable detention of freight cars.

The right of the carriers to assess charges for undue detention of equipment existed at common law, and such charges are now published in schedule form in accordance with the provisions of the interstate commerce act. It is settled that we may require the carriers to maintain reasonable demurrage charges which are in part

compensation to the carriers for use of their equipment, and in part penalties imposed on shippers for detention of cars. A charge in the nature of a penalty is not unlawful if its purpose is to secure for the public a more efficient use of equipment. While it should not be so high as to work an undue hardship upon the shipper who must occasionally pay it, it should be sufficient in amount to accomplish the purpose for which it is intended.

We have in a number of cases considered and approved charges, established by carriers, which admittedly were in part penalties to prevent detention of equipment by shippers. Thus, in *American Paper & Pulp Asso.* v. *B. & O. R. R. Co.*, 41 I. C. C., 506, at page 512, we said:

> A rule which permits the shipper to use valuable facilities of the carrier for unlimited periods, while seeking to find the markets for the goods stored or while waiting the convenience of the consumer, is not a proper rule, and the practice, as complainant charges, is beyond the function of a common carrier. Such a practice may, and often does, conflict with those functions.

The lawfulness of the charge is further assailed on the ground that, prior to its establishment, the schedules of the carriers and of the Director General provided in substance that freight might be reconsigned at the through rate applicable from the point of origin via the reconsignment point to the final destination without limit of time within which the reconsignment must be made. They contend that defendants have no right to assess a penalty against the shipper for availing himself of an arrangement so held out to shippers; and that the assessment of a penalty for the detention of cars is a double charge for a single service, because the demurrage charges at the time the penalty charge was made effective had been increased to care for the identical emergency for which the penalty charge was established.

The contention that a double charge was made for a single service was advanced in *N. Y. Hay Exchange Asso.* v. *P. R. R. Co.*, 14 I. C. C., 178, and again in the case of *New York & New Jersey Produce Co.* v. *R. R. Co.*, 49 I. C. C., 93, where the assessment of track storage charges, in addition to demurrage charges, was attacked. In both cases we found against the contention. A charge is not necessarily unlawful because it is made up of two separately published charges. The real question is as to the propriety of the aggregate charge.

Complainants refer to the many embargoes laid by the carriers, particularly in 1919 and 1920, during the period of federal control, and contend that the embargoes were largely responsible for the detention of lumber at the reconsignment points, since they limited the markets at which lumber could be sold. There was considerable confusion with respect to the application of the embargoes laid

and the notices in connection therewith during this period. It frequently happened that a shipment was sold before it reached the reconsignment point, but that upon presenting an order for reconsignment the shipper was for the first time notified that the final destination was embargoed. In some instances carriers accepted orders for reconsignment, and when the car arrived at the reconsignment point then advised that the destination was embargoed; in others, carriers held shipments at the reconsignment point on account of embargoes when, as a matter of fact, the final destination was not embargoed. For all these reasons complainants assert that it was necessary to resell the lumber and ship to other destinations, which took time and resulted in penalty charges being assessed. It is contended by complainants that an embargo is a disability of the carrier, and that where shipments were held on account of an embargo and the penalty collected, the charge was unlawful because it penalized the shipper or consignee for the disability of the carrier. Complainants also insist that having established through rates and provided for reconsignment it was unlawful to assess penalty charges upon shipments held on account of embargoes, notwithstanding tariff provisions to the effect that reconsignment orders would not be accepted to a point against which an embargo was in force at the time the shipment was forwarded from point of origin. This latter contention is contrary to our decisions, but it is argued that we have erred in this respect. The argument is not convincing.

Complainants further contend that the act requires carriers to publish and file embargoes in the manner prescribed with respect to tariffs, and we are asked to find that all embargoes which were not so published and filed were illegally laid and that all demurrage and penalty charges assessed where cars were held because of such embargoes were unlawful. The law did not, and does not, require that embargo notices be published as schedules are published. *La Fayette Box Board & Paper Co.* v. *Director General*, 59 I. C. C., 105. As a practical matter, the conditions necessitating embargoes frequently develop and end quickly. To wait until a schedule could be published and become effective would, therefore, defeat the object sought. On the other hand, to keep an embargo in effect until a schedule could be legally canceled would work unwarranted hardship upon the public.

No evidence as to the reasonableness *per se* of the charge assailed was offered other than an exhibit submitted by complainant to show that the net revenues per car-day for class I carriers were $1.07 in 1916, 99 cents in 1917, 76 cents in 1918, 58 cents in 1919, 31 cents in 1920, and 23 cents in January and February, 1921; and for the larger roads in the eastern district 32 cents in 1919. The margin between

the price paid to the mill man and the selling price of a car of lumber ranged from $18.48 in 1915 to $55.36 in 1920. No figures were shown for 1921. Complainants contend that the penalty charge is confiscatory for the reason that its application for only a few days will wipe out all this margin. But the charge applies only when shipments are detained beyond the 48 hours of free time.

The allegations of unjust discrimination and undue prejudice are based upon the fact that the penalty charge is applied on lumber when held for reconsignment and not on other commodities held for that or other purposes, or on cars held by shippers for loading.

At complainants' request, we required certain defendants to make special reports in the nature of replies to a questionnaire in connection with No. 11818. Complainants submitted several exhibits compiled from data thus furnished. One of these exhibits shows the number of cars of each of 18 commodities held for reconsignment one, two, three, and four days and over four days, the total number of cars and the total car-days, during the months of September, 1917, October, 1918, and November, 1919. This statement shows that there were 2,447 cars of lumber held 23,932 days, an average of 9.7 days, under the heading "over four days." Complainants admit that this statement shows the number of cars of lumber held over four days was larger than that of any other commodity shown. They assert that this is due in part to the numerous embargoes against lumber, which shut off markets where most lumber is sold, causing the shipper to hold the cars until he could find another purchaser, and partly to embargoes which did not exist or which having existed had been raised. The commodities held for reconsignment, the number of cars of each commodity, and the average time held are shown below:

Commodity.	Cars.	Days.	Average days.
Coke	276	1,751	6.34
Pipe	171	816	4.77
Lumber	7,505	34,781	4.63
Structural iron	139	727	4.57
Fireproofing	15	65	4.33
Structural steel	247	1,066	4.31
Brick	138	543	3.93
Coal	3,189	11,218	3.57
Oil	1,105	3,874	3.5
Sand	126	408	3.24
Cement	138	367	2.8
Hay	2,943	7,714	2.62
Tile	48	120	2.5
Fruits and vegetables	10,631	23,945	2.44
Sugar	205	502	2.44
Oats	2,549	6,170	2.42
Corn	2,506	5,594	2.23
Wheat	6,131	13,287	1.39

The following statement shows the number of order-notify shipments of lumber and other commodities held beyond free time for

orders, other than reconsignment, for the same months as in the preceding table:

Period.	Lumber.		Other commodities.	
	Cars.	Days.	Cars.	Days.
One day	196	196	12,883	12,883
Two days	116	232	7,307	15,614
Three days	97	291	4,778	14,334
Four days	64	256	2,890	11,560
Over four days	158	1,572	6,853	64,021
Total	631	2,547	36,183	118,414

Of all commodities held beyond free time during the months mentioned, there were 34,199 cars of lumber, other than for reconsignment, held 94,431 days, and 316,430 cars of other commodities held 820,950 days, aggregating 350,629 cars held a total of 915,381 days.

A summary of these statements shows:

	Cars.	Days.
Lumber held for reconsignment	7,505	94,781
Other commodities held for reconsignment	30,579	107,443
Order-notify shipments held for orders	35,814	120,961
All other cars, all commodities, held by or for consignor or cons'gnee	350,629	915,381
Total	424,527	1,178,568

Complainants point out that the cars of lumber held for reconsignment represent less than 2 per cent of all cars of all commodities held by shippers, and less than 3 per cent of all car-days all commodities were detained. The statements show, however, that the total cars of lumber held for reconsignment represent about 20 per cent of all cars held for reconsignment, and that lumber for reconsignment is detained at the hold point a longer average time than any other commodity which is reconsigned in a substantial amount. While the number of order-notify shipments held for orders is greater than the number of cars of lumber held for reconsignment, the average detention on the former is 3.37 days as compared with 4.63 on the latter. Furthermore, order-notify shipments are held at points scattered throughout the country while lumber for reconsignment is largely held at comparatively few points, and therefore more effectively tends to congest the movement of traffic.

Reconsignment of building material, such as cement, hollow tile, structural iron and steel, sand, gravel, brick, and fireproofing, is insignificant as compared with lumber. While general statements were made by complainants' witnesses to the effect that there was competition between some of these articles and lumber, no substantial evidence was offered to show that any undue prejudice existed. The

other commodities shown as held under reconsignment do not compete with lumber, and the circumstances under which they are held are different. Fruits and vegetables may properly be excepted from a rule applicable to dead freight. Hay and grain are reconsigned to a considerable extent, but this is due largely to regulations, state and national, for grading and inspection.

Statements were made that the penalty charge had resulted in reducing lumber shipments because the shippers do not want to take the risk of having the penalty applied. No figures were offered to support these statements. On the contrary, it was shown that notwithstanding advices from wholesalers that mills should discontinue shipments on account of market conditions, shipments were continued from the mills.

The penalty charge applies only to cars held for reconsignment, and complainants contend that its application to lumber held for reconsignment and not on commodities reshipped results in discrimination against the former. Evidence was offered to show that considerable delay is sometimes occasioned to commodities which are reshipped. Only one change in destination is permitted at the through rate under the reconsignment rules. A subsequent change is treated as a reshipment from point of reforwarding and the shipment is charged the tariff rates therefrom. Thus a shipment rebilled pays the combination rate based on the reforwarding point, which ordinarily is in excess of the joint through rate obtained under a reconsignment; and in addition thereto, a charge is made under certain circumstances for changing the destination.

Complainants contend that the assessment of the penalty charge on Sundays and legal holidays prior to August 19, 1920, was illegal and unreasonable. The only testimony offered to substantiate these allegations is that of one witness who testified that at Seattle, Wash., he never saw a freight office open on Sundays or holidays, and of another witness who testified that certain carriers had made refund of penalty charges which were assessed on Sundays and holidays during the period mentioned. Defendants' witnesses testified that the penalty charge was originally published on the same basis as storage charges, which apply on Sundays and holidays; that it was intended that they should apply on such days because of the great scarcity of cars when the tariff was originally published; and that the change subsequently made was to bring the penalty charge into conformity with the demurrage tariffs.

A stipulation as to certain facts concerning cars of lumber held under varying circumstances was submitted for the purpose of obtaining a ruling from us as to whether the penalty charge was legally applicable in the circumstances set forth in the stipulation. The in-

formation submitted is not sufficient in all instances to warrant a ruling. The penalty charge was assessed in some instances because the carrier refused to reconsign to an embargoed point where the embargo was placed after the shipment had left point of origin; in others, the penalty charge was assessed where shipments were held by a carrier because of an embargo prohibiting the movement of its system equipment off its lines. The record also indicates that the penalty charge was assessed where cars were refused at original destination, the freight charges paid and new bills of lading taken out consigning the cars to new destinations; that it was also assessed where delivering lines refused to deliver to a belt switching line without prepayment of the charges, although there was a joint rate in effect from point of origin to points on the belt line; that the penalty charge was assessed where shipments reconsigned to a certain point reached that point, were placed for unloading, the charges paid, and subsequently a switching order issued to deliver the shipment to another carrier within the terminal and a new bill of lading issued by the latter, consigning the car to a point outside the terminal. Under each of the foregoing instances the cars were apparently not held for reconsignment, except in the instance where the carriers refused to reconsign to an embargoed point where the embargo was placed after the shipment had left the point of origin. Where they have not already done so defendants should make prompt refund of the overcharges, unless, in the excepted instance, their tariffs contained a clause that shipments would not be reconsigned to embargoed points. *Reconsignment Case*, 47 I. C. C., 590, 634.

Complainants cite instances where there was considerable delay beyond the usual time in the movement from points of origin to the reconsignment point. It urges that these delays were numerous and many times resulted in cancellation of sales of lumber made while the cars were in transit. It asks us to find that where cars have been delayed in transit beyond reasonable and usual running time no penalty should be assessed for failure to reconsign within 48 hours. We are not persuaded that such a finding should be made.

On behalf of the Associated Cooperage Industries of America it is shown that cooperage stock, unlike lumber, is not placed in transit for the purpose of selling it after shipment, but that sales orders are actually held for each shipment when it leaves its point of origin. Cars of cooperage stock are sometimes detained at the original destination because they have been refused by the consignee as being off grade or improperly loaded. Such occasions, while infrequent, result in considerable detention because a new purchaser must be found for the shipment. The association urges that even if the

charge should be sustained as to lumber, an exception should be made with respect to cooperage stock.

Following a heavy surplus of cars after the signing of the armistice in 1918, and early in 1919, there was a rapid decrease in idle cars, and by October 1, 1919, a serious car shortage threatened. Campaigns for heavy loading and for prompt loading and unloading, which had been conducted prior to the period of depression in the early months of 1919 were again inaugurated by the Director General. Committees which had been created at strategic points throughout the country to collect data as to transportation conditions and car service in such sections prior to 1919, and which had been disbanded in the early months of that year, were reorganized. Business rapidly increased, and, as it was impossible to obtain new equipment, the car shortage became more serious and threatening, notwithstanding the efforts of the Railroad Administration. Reports of inspectors and committees indicated a heavy detention of cars containing lumber awaiting reconsignment. In September, 1919, special inquiry was made at about 30 widely separated points to determine the extent of this detention. Reports were received covering various periods during August, September, and October, 1919. These reports showed an average detention of 7.9 days for cars of lumber held for reconsignment. In view of the conditions the Director General established the charge here in issue. Shortly after the establishment of this charge a public hearing with respect thereto was held before officials of the Railroad Administration. Representatives of lumber manufacturers, shippers, and dealers were present at this hearing, but the penalty charge was kept in effect. In the early part of December, 1919, the Railroad Administration sent out inquiries to ascertain in a general way the effect of this penalty charge. The following table, thus secured, shows a comparison of the average detention of cars of lumber held for reconsignment at various points during August, September, and October, 1919, preceding the establishment of the penalty with that in November and December, 1919, and January, 1920, subsequent to the establishment of the penalty.

Place.	Before penalty.	After penalty.
	Days.	Days.
Cheyenne, Wyo.	11.2	7.4
Norfolk, Va.	4.1	3.1
All points on C. & E. I. R. R.	3.4	2.3
Whitefish, Mont.	12.2	4.7
All points on I. C. R. R.	9.5	5.6
Dupo, Ill. (M. P. R. R.)	10.2	5.1
Cincinnati, Ohio (L. & N.)	5.9	2.6
Jacksonville, Fla.	4.8	
Minnesota Transfer, Minn. (G. N. R. R.)	7.6	5

While there was an increase in the average number of days detention on the Great Northern, at Minnesota Transfer, after the establishment of the penalty charge, the number of cars detained after the penalty became effective was only 7 as compared with 68 cars for the period prior to its establishment. Complainants criticise the comparisons, and allege that the reports on which they are based do not take into consideration the fact that the movement of lumber was delayed on account of embargoes; that the roads reporting did not use the same periods; that the detentions for the various periods were added together; that the figures include free time; and that a check of a few of the cars as to which complainants could secure information discloses that they were held by the carriers in error and not for account of consignor or consignee.

In December, 1920, the carriers sent out inquiries through the American Railway Association to a number of railroads asking for figures as to the detention of lumber for reconsignment during comparable periods before and after the penalty charge went into effect, respectively. May, 1916, and September, 1920, were selected as the most representative and normal months for the respective years. The following comparative statement of lumber traffic handled by 36 railway systems at their principal reconsigning points in May, 1916, and September, 1920, was compiled from the answers received:

	May, 1916.	September, 1920.
Total traffic in cars	141,317	108,898
Total cars reconsigned	12,561	8,370
Total cars reconsigned prior to arrival	4,794	4,415
Total cars reconsigned first and second days following arrival or within free time	4,248	2,350
Cars delayed beyond free time for reconsignment	3,519	1,574
Total car-days that cars were held for reconsignment	36,509	12,045
Car-days in excess of free time that cars were held for reconsignment	24,153	5,705
Per cent of lumber traffic	100.00	77.09
Per cent of lumber traffic reconsigned	8.89	7.69
Per cent of reconsigned lumber traffic reconsigned while in transit or prior to arrival at reconsigning points	38.17	52.69
Per cent of reconsigned lumber traffic reconsigned the first and second days following arrival or within the free penalty time	33.82	28.22
Per cent of reconsigned lumber traffic delayed beyond the free penalty time for reconsignment	28.01	18.79
Average days delay per car to cars reconsigned after arrival at reconsigning points	4.72	3.04
Average days delay in excess of free time per car to cars that were delayed over the free penalty time	6.87	3.62
Number of cars of lumber unloaded at the principal stations on the lines reporting	11,795	11,551
Total car-days delay in unloading lumber at the principal stations	27,448	21,848
Average days delay per car in unloading lumber at the principal stations	2.33	1.89

While there was but a slight decrease in the percentage of cars reconsigned in 1920 as compared with 1916, there was a substantial increase in 1920 in the percentage of cars reconsigned in transit, and substantial decreases in the percentage of cars delayed beyond the free time and in the average delay of such cars.

A large volume of lumber moves through Cincinnati. Prior to the establishment of the penalty charge as many as 200 cars of lumber

were often held at that point for periods of from 1 to 20 days. In 1919 it became necessary on a number of occasions to lay embargoes on lumber consigned to move via that city. Since the penalty charge became effective there has been a material increase in the number of orders for reconsignment of lumber prior to its arrival. In 1916 only 15 per cent of the lumber had been reconsigned before it arrived at Cincinnati. Since the establishment of the penalty charge 65 per cent of the lumber has been reconsigned before it arrives. At Laurel, Mont., the penalty charge has materially decreased the holding of cars. Before the establishment of the penalty charge orders for disposition of the cars were seldom received prior to arrival, but after its establishment disposition orders were furnished on a majority of the cars before arrival.

It is much more difficult to hold reconsigned cars than cars which have been placed for delivery, since cars held in yards for reconsignment must be switched over and over again to get out other cars on which forwarding orders have been received. To hold cars in yards also congests the terminals and interferes with the prompt handling of other freight. If a shipper habitually delays cars for unloading at destination the carriers may place an embargo against freight consigned to him and thus prevent further detention of equipment; if the shipper habitually delays loading cars the carrier may refuse further supply and thus prevent detention and accumulation of cars at the loading point. Defendants urge that it is not feasible to deal with cars at the reconsignment point by embargo or refusal to furnish further cars, and that the only effective means of dealing with detention at the reconsignment point is by applying a penalty charge.

Representatives of the car-service division of the American Railway Association testified that the various extensions of the expiration date of the penalty charge, and the present schedule naming the charge without limitation as to its expiration, were published under their instructions after investigation had shown that lumber is practically the only commodity which abuses the reconsignment privilege. They refer to the frequent car shortages which have occurred in the past five or six years and state that while the penalty charge was established in the first instance, as an emergency measure on account of the car shortage then existing, they believe that it should be maintained permanently to assist in preventing car shortages in the future; that while there are a large number of idle cars at the present time, practically no new equipment has been added in the last two years; and that there is a large percentage of bad-order cars now on hand. They urge that with a decrease in the number of cars in the country, and with business generally in suspense and likely to increase in the near future, particularly in the building industry, it is essential to

89978—22——3

conserve the car supply to the utmost and protect it by all practical means; and that a withdrawal of the charge would soon revive those conditions which made necessary its establishment.

In normal times of brisk lumber business interveners on behalf of defendants have difficulty in obtaining cars for direct shipments from the mills on account of the many cars of lumber billed to hold points for reconsignment. In times of car shortage cars held for reconsignment congest terminals and delay direct mill shipments. The penalty charge has relieved these conditions and they favor its continuance.

Complainants argue that the operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit. Complainants also assert that the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand, with less loss through fluctuations in price, than if compelled to purchase directly from the mills at distant points; and that with his limited capital the small retailer could not maintain a purchasing force to ascertain the financial rating and standing of small mills and, in the absence of the wholesaler upon whom he now relies for any contractual guaranty concerning the lumber, would be compelled to buy from the large mills or the large retailers at prices higher than prevail on transit lumber.

No evidence has been submitted to show to what extent the penalty charge has been applied on shipments made by members of complainants' association. A representative of a large wholesale firm testified that about 50 per cent of the lumber handled by his firm was shipped to a hold point for reconsignment, but that 90 per cent of these shipments were reconsigned before they reached the reconsignment point. His firm handled a large number of cars in 1920, but the penalty was applied on only six of its cars. That the penalty was applied on but few shipments may be due to the fact that this firm has extensive assembly yards and a large sales organization. We are not concerned with the method by which complainants' mem-

bers conduct their business. It may properly be pointed out that the placing of shipments in transit with the intention of selling them while they are on the rails of the carriers inevitably results in detention to some cars. The small mill is constantly tempted to put cars on the rails to secure an advance from the wholesaler, even though trade conditions are such that there is no possibility of disposing of the lumber within a reasonable time after the cars reach the hold point. When the shipment reaches the hold point and the market is rising, the wholesaler has an incentive to hold the shipment awaiting further advance in price. On a falling market the consumer defers purchase.

Complainants argue that since defendants established the transit arrangement and maintained it for a number of years without limit as to the time shipments might be held for reconsignment, and provided that freight may be reconsigned subject to demurrage charges which were and now are, to a certain extent, graduated, the carriers have recognized the right of a shipper to delay giving reconsignment instructions and to hold cars beyond the expiration of the free time.

A railroad's function is to move traffic. The furnishing of storage is not a primary function. The free time provided for loading, unloading, and reconsignment has been fixed as the reasonable time within which cars should be released and made available for further movement. The shipper has no inherent right to detain a car beyond the free time and thus prevent it from being used for transportation by other shippers. Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation the carriers are justified in taking steps to prevent such abuses.

We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars, and generally speaking no congestion in the country. In the past car shortages at times have followed quickly upon periods of car surplus. It is impossible to forecast the continuance of present conditions, or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue it is and will be unreasonable.

The respondents in the suspension case have justified the cancellation of the penalty charge.

It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions,

and is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant.

There remains for consideration the proposal of the Chicago, Peoria & St. Louis Railroad Company to cancel the $3 reconsignment charge on lumber when instructions are received prior to arrival of car, and to reduce the charge from $7 to $3 when instructions are received after arrival of car. Little evidence was produced with respect to the changes in reconsignment charges thus proposed. The charges of $3 and $7 now in effect are generally uniform on all railroads throughout the country and were approved by us in the *Reconsignment Case, supra.* This respondent's traffic manager testified that, in his opinion, the proposed charges were compensatory, but admitted that he had made no close study as to the service rendered under reconsignment. Upon the record before us we are of opinion and find that this respondent has not justified its proposed schedule.

By tariff effective September 6, 1921, the Toledo, St. Louis & Western Railroad Company made its charge for reconsignment of lumber at junction points $3, irrespective of whether the instructions were received prior or subsequent to arrival of car, but the lawfulness of that tariff is not in issue in this proceeding.

The complaints in the subnumbers will be retained on our docket for the purpose of giving the complainants therein opportunity to present evidence, if they so desire, as to whether the charges collected were applicable under the tariffs.

Appropriate orders will be entered. Any applications by the carriers for permission to cancel the charge on less than statutory notice will receive consideration.

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of February, A. D. 1922.

No. 11818 (and Sub-Nos. 1 to 13, inclusive).

American Wholesale Lumber Association.

v.

James C. Davis, Director General of Railroads, as Agent; Aberdeen & Rockfish Railroad Company; Abilene & Southern Railway Company; Ahnapee & Western Railway Company; The Akron & Barberton Belt Railroad Company; Alabama & Vicksburg Railway Company; Alabama Central Railway; Alabama, Florida & Gulf Railroad Company; Alabama Great Southern Railroad Company; The Alabama Northern Railway Company; Alabama & Northwestern Railroad Company; Alabama, Tennessee & Northern Railroad Corporation; Alcolu Railroad Company; Alexandria & Western Railway Company; Alton & Southern Railroad Company; Andalusia, Florida & Gulf Railway; Ann Arbor Railroad Company; Arcade & Attica Railroad Corporation; Arizona Eastern Railroad Company; Arkansas & Louisiana Midland Railway Company and H. B. Hearn and H. R. Speed, receivers; Arkansas Central Railroad Company; The Arkansas Western Railway Company; Asheville & Craggy Mountain Railway Company; Asheville Southern Railway Company; Ashland Coal & Iron Railway Company; The Atchison, Topeka & Santa Fe Railway Company; Atlanta & St. Andrews Bay Railway Company; Atlanta & West Point Railroad Company; Atlanta, Birmingham & Atlantic Railway Company; Atlantic & Western Railroad Company; Atlantic & Yadkin Railway Company; Atlantic City Railroad Company; Atlantic Coast Line Railroad Company; Atlantic Northern Railway Company; Atlantic, Waycross & Northern Railroad Company; Augusta Railroad Company; Baltimore & Ohio Chicago Terminal Railroad Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Railroad Company in Pennsylvania; Baltimore, Chesapeake & Atlantic Railway Company; Bamberger Electric Railroad Company; Bangor & Aroostook Railroad Company; Barre Branch Railroad Company; Bartlett-Western Railway Company; Batesville Southwestern Railroad; Bath & Hammondsport Railroad Company; The Beaumont, Sour Lake & Western Railway Company; Bellefonte Central Railroad Company; Belt Railway Company of Chattano[illegible]; The Belt Railway Company of Chicago; Bennettsville & Cheraw Rai[illegible] Company; Bessemer & Lake Erie Railroad Company; Big Fork & [illegible]ernational Falls Railway Company; Birmingham & Northwestern Railway Company; Birmingham & Southeastern Railway Company; Birmingham Belt Railroad Company; Birmingham Southern Railroad Company; Black Mountain Railway Company; Blue Ridge Railway Company; Boston & Albany Railroad Company (The New York Central

Railroad Company, lessee); Boston & Maine Railroad; Boyne City, Gaylord & Alpena Railroad Company; Brownwood North & South Railway Company; Buffalo & Susquehanna Railroad Corporation; The Buffalo Creek Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; Butler County Railroad Company; Butte, Anaconda & Pacific Railway Company; California Southern Railroad Company; Camas Prairie Railroad Company; Cambria & Indiana Railroad Company; Carolina & North-Western Railway Company; Carolina & Tennessee Southern Railway Company; The Carolina & Yadkin River Railway Company; Carolina, Clinchfield & Ohio Railway; Carolina, Clinchfield & Ohio Railway of South Carolina; Carolina Railroad Company; Carrollton & Worthville Railroad Company; Cement, Tolena & Tidewater Railway; Cedar Rapids & Iowa City Railway; Central Indiana Railway Company; Central New England Railway Company; Central New York Southern Railroad Corporation; Central of Georgia Railway Company; The Central Railroad Company of New Jersey; Central Railway Company of Arkansas; Central Vermont Railway Company; Charles City Western Railway Company; Charleston & Western Carolina Railway Company; Charlotte Harbor & Northern Railway Company; Charlotte, Monroe & Columbia Railroad Company; Cheat Haven & Bruceton Railroad Company; The Chesapeake & Ohio Railway Company; The Chesapeake & Ohio Railway Company of Indiana; Chesapeake & Ohio Railway Company of Kentucky; Chesapeake Western Railroad Company; Chesapeake Western Railway; Chesterfield & Lancaster Railroad Company; Chestnut Ridge Railway Company; The Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railroad Company and W. J. Jackson, receiver; Chicago & Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago & North Western Railway Company; Chicago & Western Indiana Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company; Chicago Great Western Railroad Company; Chicago, Harvard & Geneva Lake Railway Company; Chicago Heights Terminal Transfer Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Kalamazoo & Saginaw Railway Company; The Chicago, Lake Shore & South Bend Railway Company; Chicago, Memphis & Gulf Railroad Company; Chicago, Milwaukee & Gary Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, North Shore & Milwaukee Railroad; Chicago, Ottawa & Peoria Railway Company; Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and Wm. Cotter, receivers; The Chicago River & Indiana Railroad Company; The Chicago, Rock Island & Gulf Railway Company; The Chicago, Rock Island & Pacific Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago Short Line Railway Company; Chicago, South Bend & Northern Indiana Railway Company; Chicago, Terre Haute & Southeastern Railway Company; Chicago, West Pullman & Southern Railroad Company; The Cimarron & Northwestern Railway Company; Cincinnati, Burnside & Cumberland River Railway Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati, Lebanon & Northern Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Cincinnati Northern Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Clinton & Oklahoma Western Railway Company; Clinton, Davenport & Muscatine Railway Company; The Colorado & Southern Railway Com-

pany; The Colorado & Wyoming Railway Company; The Colorado, Wyoming & Eastern Railway Company; Columbia, Newberry & Laurens Railroad Company; Cooperstown & Charlotte Valley Railroad Company; Copper Range Railroad Company; Coudersport & Port Allegany Railroad Company; The Crystal River Railroad Company; Cumberland & Manchester Railroad Company; Cumberland & Pennsylvania Railroad Company; The Cumberland Valley Railroad Company; Dallas Terminal Railway & Union Depot Company; Dansville & Mount Morris Railroad Company and A. S. Murray, receiver; Danville & Western Railway Company; Davenport, Rock Island & Northwestern Railway Company; The Dayton & Union Railroad Company; Dayton-Goose Creek Railway Company; The Dayton Union Railway Company; Deering Southwestern Railway; Deep Creek Railroad; The Delaware & Hudson Company; Delaware & Northern Railroad Company; The Delaware, Lackawanna & Western Railroad Company; The Delaware Valley Railway Company; The Denison & Pacific Suburban Railway Company; The Denver & Rio Grande Railroad Company and A. R. Baldwin, receiver; The Denver & Salt Lake Railroad Company and W. R. Freeman and C. Boettcher, receivers; The Des Moines Union Railway Company; The Detroit & Huron Railway Company; Detroit & Mackinac Railway Company; Detroit & Toledo Shore Line Railroad Company; Detroit, Bay City & Western Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Detroit Manufacturers Railroad; Detroit Terminal Railroad Company; Detroit, Toledo & Ironton Railroad Company; The Duluth & Iron Range Railroad Company; Duluth, Missabe & Northern Railway Company; The Duluth, South Shore & Atlantic Railway Company; Durham & Southern Railway Company; East & West Coast Railway; East Carolina Railway; The East Jordan & Southern Railroad Company; The East St. Louis Connecting Railway Company; Eastern Kentucky Railway Company and Sturgis G. Bates, receiver; East St. Louis, Columbia & Waterloo Railway; East Texas & Gulf Railway Company; Eastern Texas Railroad Company; El Paso & Southwestern Company; Electric Shore Line Railroad Company; Elberton & Eastern Railroad Company; Elgin, Joliet & Eastern Railway Company; Erie Railroad Transit Line; Erie & Michigan Railway & Navigation Company; Escanaba & Lake Superior Railroad Company; Evansville, Indianapolis & Terre Haute Railway Company; Federal Valley Railroad Company; Fellsmere Railroad; Fernwood, Columbia & Gulf Railroad Company; Flint River & Northeastern Railroad Company; Florida East Coast Railway Company; Fonda, Johnstown & Gloversville Railroad Company; Fort Dodge, Des Moines & Southern Railroad Company; Fort Wayne, Cincinnati & Louisville Railroad Company; The Fort Worth & Denver City Railway Company; Fort Worth & Rio Grande Railway Company; Fort Worth Belt Railway Company; Fourche River Valley & Indian Territory Railway Company; Frankfort & Cincinnati Railway Company; The Franklin & Abbeville Railway Company; Franklin & Pittsylvania Railroad Company; Gainesville & Northwestern Railroad Company; Gainesville Midland Railway; The Galveston, Harrisburg & San Antonio Railway Company; Garyville Northern Railroad Company; Georgia & Florida Railway and W. R. Sullivan, J. F. Lewis and L. M. Williams, receivers; The Georgia, Florida & Alabama Railway Company; Georgia Northern Railway; Georgia Railroad; Georgia Southern & Florida Railway Company; Georgia Southwestern & Gulf Railroad Company; The Gettysburg & Harrisburg Railway Company; Gilmore & Pittsburg Railroad Company, Limited;

Glenmora & Western Railway Company; Gould Southwestern Railway and W. H. Roberts receiver; Grafton & Upton Railroad Company; The Grand Canyon Railway Company; Grand Rapids & Indiana Railway Company; The Grand River Valley Railway Company; The Grand Trunk Milwaukee Car Ferry Company; Grand Trunk Railway Company of Canada; Grand Trunk Western Railway Company; The Great Northern Railway Company; Green Bay & Western Railroad Company; Greene County Railroad Company; Greenwich & Johnsonville Railway Company; Groveton, Lufkin & Northern Railway Company; Gulf & Ship Island Railroad Company; Gulf, Beaumont & Great Northern Railway Company; Gulf, Colorado & Santa Fe Railway Company; Gulf, Florida & Alabama Railway Company and J. T. Steele, receiver Gulf, Mobile & Northern Railroad Company; Gulf, Texas & Western Railway Company; The Hagerstown & Frederick Railway Company; Harriman & Northeastern Railroad Company; Hartford Eastern Railway Company; Hartwell Railway Company; Hawkinsville & Florida Southern Railway Company; High Point, Randleman, Asheboro & Southern Railroad Company; The Hocking Valley Railway Company; Holton Interurban Railway Company; Houston & Brazos Valley Railway Company and Geo. C. Morris, receiver; Houston & Shreveport Railroad Company; Houston & Texas Central Railroad Company; Houston Belt & Terminal Railway Company; The Houston East and West Texas Railway Company; The Huntingdon & Broad Top Mountain Railroad & Coal Company; Iberia & Vermilion Railroad Company; Illinois Central Railroad Company; Illinois Northern Railway; Indiana Harbor Belt Railroad; The Indianapolis Union Railway Company; International & Great Northern Railway Company and James A. Baker, receiver; The Interstate Railroad Company; Iowa Southern Utilities Company; Ironton Railroad Company; Jefferson & Northwestern Railway Company; Jonesboro, Lake City & Eastern Railroad Company; Kalamazoo, Lake Shore & Chicago Railway Company; Joplin & Pittsburg Railway Company; The Kanawha & Michigan Railway Company; Kanawha & West Virginia Railroad Company; Kanawha, Glen Jean & Eastern Railroad Company; Kane & Elk Railroad Company; Kane & Elk Railroad Company; The Kansas City, Clinton & Springfield Railway Company; The Kansas City, Mexico & Orient Railroad Company and Wm. T. Kemper, receiver; Kansas City, Mexico & Orient Railway Company of Texas; Kansas City, Northwestern Railroad and L. S. Cass, receiver; Kansas City, Kaw Valley, Western Railway Company; The Kansas City Southern Railway Company; Kansas City Terminal Railway Company; Kansas, Oklahoma & Gulf Railway Company; Kentucky & Indiana Terminal Railroad Company; Kentucky & Tennessee Railway; Kewaunee, Green Bay & Western Railroad Company; Kinston & Carolina Railroad Company; The Kinston-Carolina Railroad Company; Knoxville, Sevierville & Eastern Railway Company; Kosciusko & Southeastern Railroad Company; La Crosse & Southeastern Railway Company; Lackawanna & Wyoming Valley Railroad Company; Lake Charles & Northern Raailroad Company; The Lake Erie & Western Railroad Company; Lake Erie & Eastern Railroad Company; Lake Superior & Ishpeming Railway Company; Lake Superior Terminal & Transfer Railway Company; Lansing Manufacturers Railroad Company; Lansing Transit Railway Company; Lawrenceville Branch Railroad Company; Leetonia Railway Company; The Lehigh & Hudson River Railway Company; Lehigh & New England Railroad Company; Lehigh Valley Railroad Company;

Litchfield & Madison Railway Company; Little Kanawha Railroad Company; Little River Railroad Company (of Tennessee); Live Oak, Perry & Gulf Railroad Company; Long Fork Railway Company; The Long Island Railroad Company, North Shore Branch; The Lorain & West Virginia Railway Company; The Lorain, Ashland & Southern Railroad Company; Loranger, Louisiana & Northeastern Railroad Company; Los Angeles & Salt Lake Railroad Company; Louisiana & Arkansas Railway Company; The Louisiana & North West Railroad Company and Geo. W. Hunter, receiver; Louisiana Railway & Navigation Company; Louisiana Southern Railway Company; Louisiana Western Railroad Company; Louisville & Nashville Railroad Company; Louisville & Wadley Railroad Company; Louisville Bridge & Terminal Railroad; Louisville, Henderson & St. Louis Railway Company; Louisville, New Albany & Corydon Railroad Company; McCloud River Railroad Company; Mackinac Transportation Company; Macon, Dublin & Savannah Railroad Company; Maine Central Railroad Company; Manchester & Oneida Railway Company; Manistee & Northeastern Railroad and The Michigan Trust Company, receiver; Manistique & Lake Superior Railroad Company; Marianna & Blountstown Railroad Company; Marion & Southern Railroad Company; Marion & Eastern Railroad Company; Maryland & Pennsylvania Railroad Company; Maryland, Delaware & Virginia Railway Company; Maxton, Alma & Southbound Railroad Company of Alma, N. C.; Memphis, Dallas & Gulf Railroad Company; Meridian & Memphis Railway Company; Miami Mineral Belt Railroad Company; Michigan Air Line Railway; The Michigan Central Railroad Company; Michigan Railway Company; Middletown & Unionville Railroad Company; Midland & Northwestern Railway Company; Midland Valley Railroad Company; Mineral Range Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis Eastern Railway Company; Minneapolis, Red Lake & Manitoba Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Minneapolis Western Railway Company; Minnesota & International Railway Company; Minnesota Transfer Railway Company; Mississippi Central Railroad Company; Missouri & Illinois Bridge & Belt Railroad Company; Missouri & North Arkansas Railroad Company; Missouri, Kansas & Texas Railway Company and C. E. Schaff, receiver; Missouri, Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver; Missouri, Oklahoma & Gulf Railway Company of Texas; Missouri Pacific Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; Missouri Southern Railroad Company; Modesto & Empire Traction Company; Mobile & Ohio Railroad Company; The Monongahela Railway Company; Montana, Wyoming & Southern Railroad Company; Montpelier & Wells River Railroad; Morehead & North Fork Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Morgantown & Kingwood Railroad Company; Monhassuck Valley Railroad Company; Mount Jewett, Kinzua & Riterville Railroad Company; Muncie Belt Railway Company; Munising, Marquette & Southeastern Railway Company; Narragansett Pier Railroad; Nashville, Chattanooga & St. Louis Railway; Natchez & Southern Railway Company; Natchez, Columbia & Mobile Railroad Company; Nevada Copper Belt Railroad Company; Newaukum Valley Railroad Company; New Iberia & Northern Railroad Company; New Jersey & New York Railroad Company; New Jersey, Indiana & Illinois Railroad Company; New Mexico Central Railway Company; New Westminster Southern Railway Company; New Orleans & Northeastern Railroad Company; New Orleans Great Northern

Railroad Company; New Orleans, Natalbany & Natchez Railway Company; The New Orleans Terminal Company; New Orleans, Texas & Mexico Railway Company; The New Park & Fawn Grove Railroad; The New York & Long Branch Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York Connecting Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Philadelphia & Norfolk Railroad Company; New York, Susquehanna & Western Railroad Company; Nez Perce & Idaho Railroad Company; Norfolk & Portsmouth Belt Line Railroad Company; Norfolk & Western Railway Company; Norfolk Southern Railroad Company; Northampton & Bath Railroad Company; Northeast Oklahoma Railroad Company; Northern Alabama Railway Company; The Northern Ohio Railway Company; Northern Pacific Railway Company; The Northern Pacific Terminal Company of Oregon; Northwestern Pacific Railroad Company; Northwestern Railroad of South Carolina; Norwood & St. Lawrence Railroad Company; Ocklawaha Valley Railroad Company and H. S. Cummings, receiver; The Ohio River & Western Railway Company; Okmulgee Northern Railway Company; Oneida & Western Railroad Company; Ontonagon Railroad Company; The Orange & Northwestern Railroad Company; Orangeburg Railway and C. E. Denniston, receiver; Oregon Electric Railway Company; Oregon Short Line Railroad Company; Oregon Trunk Railway Company; Oregon-Washington Railroad & Navigation Company; Paducah & Illinois Railroad Company; The Owasco River Railway; Pacific & Idaho Northern Railway Company; Palatine, Lake Zurich & Wauconda Railroad Company; Pacific Coast Railroad Company; Pacific Electric Railway Company; Panhandle & Santa Fe Railway Company; Paris & Great Northern Railroad Company; Paris & Mount Pleasant Railroad Company and R. H. Worthan, receiver; Pecos Valley Southern Railway Company; Pelham & Havana Railroad Company; The Pennsylvania & Atlantic Railroad Company (Union Transportation Company, lessee); The Pennsylvania Railroad Company; Peoria & Pekin Union Railway Company; Peoria Railway Terminal Company; Pere Marquette Railway Company; Pere Marquette Railroad of Indiana; Philadelphia & Reading Railway Company; Philadelphia Belt Line Railroad Company; The Pickens Railroad Company; Piedmont & Northern Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Pittsburg & Shawmut Railroad Company; Pittsburg & Susquehanna Railroad Company; Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Pittsburgh, Lisbon & Western Railroad Company; The Pittsburg, Shawmut & Northern Railroad Company and F. S. Smith, receiver; Pontiac, Oxford & Northern Railroad Company; Portland Terminal Company; Potato Creek Railroad Company; The Poteau Valley Railroad Company; Prattsburg Railway Corporation; Prescott & Northwestern Railroad Company; Preston Railroad Company; Pullman Railroad Company; Quanah, Acme & Pacific Railway Company; Quincy, Omaha & Kansas City Railroad Company; Railway Transfer Company of Minneapolis; Raleigh & Charleston Railroad Company; Randolph & Cumberland Railway Company; Rapid City, Black Hills & Western Railroad Company; Rapid Railroad Company; Raquette Lake Railway Company; Raritan River Railroad Company; Reynoldsville & Falls Creek Railroad Company; The Rhode Island Company and F. H. Swan, T. F. Green, and Z. W. Bliss, receivers;

Richmond, Fredericksburg & Potomac & Richmond & Petersburgh Railroad Connecting Company; Rio Grande & Eagle Pass Railway Company; Rio Grande, El Paso & Santa Fe Railroad Company; The Rio Grande Southern Railroad Company; Robey & Northern Railroad Company; Rockingham Railroad Company; Rock Island Southern Railway and T. H. Beacom and W. T. Abbott, receivers; Rockport, Langdon & Northern Railway Company; Rome & Northern Railroad Company and D. B. Carson, receiver; Roscoe, Snyder & Pacific Railway Company; Rutland Railroad Company; St. John River Terminal Company; St. Johnsbury & Lake Champlain Railroad Company; The St. Joseph & Grand Island Railway Company; St. Louis & Hannibal Railroad Company; The St. Louis, Brownsville & Mexico Railway Company; St. Louis, Kennett & Southeastern Railroad Company; St. Louis Merchants Bridge Company; St. Louis, San Francisco & Texas Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; St. Louis Transfer Railway Company; The St. Louis, Troy & Eastern Railroad Company; St. Paul Bridge & Terminal Railway Company; The Salina Northern Railroad Company and H. C. Brent and P. W. Goebel, receivers; San Antonio & Aransas Pass Railway Company; San Antonio Southern Railway Company; San Diego & Arizona Railway Company; San Antonio, Uvalde & Gulf Railroad and A. R. Ponder, receiver; Sand Springs Railway Company; The Sandy Valley & Elkhorn Railway Company; Sapulpa & Oil Field Railroad; Sardis & Delta Railroad Company; Savannah & Atlanta Railway; Schoharie Valley Railway Company; Seaboard Air Line Railway Company; The Sharpsville Railroad Company and G. M. McIlvain, receiver; Shearwood Railway Company; Shreveport, Houston & Gulf Railroad Company; Sioux City Terminal Railway Company; Southern Pacific Company; Southern Railway—Carolina Division; Southern Railway Company; Southern Railway Company in Kentucky; Southern Railway Company of Indiana; Southern Railway Company in Mississippi; South Georgia Railway Company; South Manchester Railroad Company; Spokane International Railway Company; Spokane, Portland & Seattle Railway Company; The Staten Island Rapid Transit Railway Company; Sugar Land Railway Company; Sunset Railway Company; Susquehanna & New York Railroad Company; Susquehanna River & Western Railroad Company; Sylvania Central Railway Company; Tallulah Falls Railway Company; Tampa & Gulf Coast Railway; Tampa Northern Railroad Company; Tampa Southern Railroad; Tennessee, Alabama & Georgia Railroad Company; Tennessee Central Railroad Company and W. K. McAlister and H. W. Stanley, receivers; Tennessee Railway Company and J. N. Baker, trustee; Terminal Railroad Association of St. Louis; Texarkana & Fort Smith Railway Company; Texas & New Orleans Railroad Company; The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers; The Texas Mexican Railway Company; Texas Midland Railroad; Texas Short Line Railway Company; Texas State Railroad; Tidewater Southern Railway Company; Tionesta Valley Railway Company; The Toledo & Ohio Central Railway Company; Toledo & Western Railroad Company; Toledo, Peoria & Western Railway Company and E. N. Armstrong, receiver; Toledo, Saginaw & Muskegon Railway Company; Toledo, St. Louis & Western Railroad Company and W. L. Ross, receiver; The Toledo Terminal Railroad Company; Townsville Railroad Company; Tonopah & Goldfield Railroad Company; Trans-Mississippi Terminal Railroad Company; Tremont & Gulf Railway Company; The Trinity & Brazos Valley

Railway Company and Jno. A. Hulen, receiver; Trinity Valley & Northern Railway Company; Trinity Valley Southern Railroad Company; Tucson, Cornelia & Gila Bend Railroad Company; Tug River & Kentucky Railroad Company; Tuskegee Railroad Company; The Ulster & Delaware Railroad Company; Unadilla Valley Railway Company; Union & Glen Springs Railroad Company; Union Freight Railroad Company; Union Pacific Railroad Company; Union Point & White Plains Railroad Company; Union Railway Company (Memphis); Union Traction Company of Indiana; Unity Railway Company; Ursina & North Fork Railway Company; Valdosta, Moultrie & Western Railway Company; The Valley Railroad Company of Virginia; Vicksburg, Shreveport & Pacific Railway Company; Virginia & Carolina Southern Railroad Company; Virginia & Truckee Railway; Virginia Blue Ridge Railway Company; The Virginian Railway Company; Visalia Electric Railroad Company; Wabash Railway Company; The Wabash, Chester & Western Railroad Company and J. Fred Gilster, receiver; Wadley Southern Railway Company; Warrenton Railroad Company; Washington & Choctaw Railway Company; Washington & Vandemere Railroad Company; Washington, Baltimore & Annapolis Electric Railroad Company; Waterloo, Cedar Falls & Northern Railway Company; Watertown & Sioux Falls Railway Company; Waupaca-Green Bay Railroad Company; Waycross & Southern Railroad Company; Washington & Lincolnton Railroad Company; Washington & Western Maryland Railroad Company; The Weatherford, Mineral Wells & Northwestern Railway Company; West Jersey & Seashore Railroad Company; West Shore Railroad Company (The New York Central Railroad Company, lessee); West Side Belt Railroad Company; The West Virginia Midland Railroad Company; Western Allegheny Railroad Company; Western & Atlantic Railroad Company; Western Maryland Railway Company; Western New York & Pennsylvania Traction Company; The Western Pacific Railroad Company; The Western Railway of Alabama; The Wheeling & Lake Erie Railway Company; Wheeling Terminal Railway Company; White River Railroad Company; The Wichita Falls & Northwestern Railway and C. E. Schaff, receiver; Wichita Falls & Oklahoma Railway Company; Wichita Valley Railroad Company; Wiggins Ferry Company; Wilkes-Barre & Eastern Railroad Company; Wildwood & Delaware Bay Short Line Railroad Company; Willamette Valley Southern Railway Company; The Williams Valley Railroad Company; Williamson & Pond Creek Railroad Company; Williamsport & North Branch Railroad Company and Edw. Bailey, receiver; The Winfield Railroad Company; Winston-Salem Southbound Railway Company; Wisconsin & Northern Railroad Company; Wood River Branch Railroad Company; Wrightsville & Tennille Railroad Company; Yadkin Railway Company; Yakima Valley Transportation Company; The Yazoo & Mississippi Valley Railroad Company; York Harbor & Beach Railroad Company; and The Youngstown & Ohio River Railroad Company.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before March 13, 1922, and thereafter to abstain, from publishing, demanding, or collecting the penalty charge of $10 per car per day on lumber and other forest products held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

Investigation and Suspension Docket No. 1421.

Penalty Charge on Lumber Held for Reconsignment.

It appearing. That by orders dated October 13, 1921, and October 22, 1921, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and subsequently ordered that the operation of said schedules be suspended until March 14, 1922;

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That respondent Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, receivers, be, and they are hereby, notified and required to cancel said schedules on or before March 13, 1922, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, in so far as they propose to cancel the $3 reconsignment charge on lumber when instructions are received prior to arrival of car, and to reduce the charge from $7 to $3 when instructions are received after the arrival of car.

It is further ordered, That the orders heretofore entered in this proceeding suspending the operation of said schedules except in so far as these schedules are ordered canceled in the next preceding paragraph, be, and they are hereby, vacated and set aside as of March 13, 1922, and that this proceeding be discontinued.

By the Commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

39 And afterwards on, to wit, the 15th day of June, 1922, this matter coming on to be heard, the following order was entered by the Court:

40 United States District Court, Northern District of Illinois, Eastern Division.

Thursday, June 15, A. D. 1922.

Present: Honorable George T. Page, Circuit Judge.
Present: Honorable George A. Carpenter, District Judge.
Present: Honorable Ferdinand A. Geiger, District Judge.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEGE, and L. L. BARTH, Trustees, Plaintiff-,

vs.

UNITED STATES OF AMERICA; AMERICAN WHOLESALE LUMBER Association, Interstate Commerce Commission, Intervenors, Defendants.

Order Amending Bill of Complaint.

Now comes the plaintiff, Edward Hines Yellow Pine Trustees, by its counsel, upon motion duly made and entered, moves the Court to amend its bill of complaint in said cause by adding a new paragraph after the 9th paragraph of said bill, and just prior to the paragraph praying for relief, to wit:

"(10) It further shows that the said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because it interferes with the constitutional right of carriers by railroad to the use of their own property and compels the said carriers to permit the use of their property without compensation, in violation of the Fifth Amendment to the Constitution of the United States."

It is ordered, adjudged and decreed that said amendment to bill of complaint be allowed.
By the Court.

——, *U. S. Judge.*

Dated this — day of ——, A. D. 1922.

41 And on, to wit, the 13th day of June, 1922, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss the Bill of Complaint in words and figures following, to wit:

42 United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff-,

v.

UNITED STATES OF AMERICA, Defendant.

Motion of the United States to Dismiss the Bill of Complaint.

United States of America, defendant, by its counsel, now comes and moves the court to dismiss the bill of complaint in the above-entitled cause at the cost of the plaintiff.

As grounds for this motion it is shown—

1. The bill of complaint is vague, indefinite, uncertain, and insufficient, in this, to-wit, the bill of complaint with Exhibit A attached thereto and made part thereof fails to disclose the nature of the "common law trust" of Edward Hines Yellow Pine Trustees; or the nature of "the lumber manufacturing enterprise" operated by such common law trust; or the nature of the railroad which the common law trust is "just completing" between Lumberton and Kiln, Mississippi, which the common law trust "intends operating as a common carrier of freights by railroad"; or in what particulars it will, "in certain matters," become subject to the provisions of the various acts of Congress; by reason whereof plaintiff has failed to disclose any interest which entitles plaintiff to relief.

43

2. It does not appear from the bill of complaint and Exhibit A attached thereto and made part thereof that Edward Hines Yellow Pine Trustees, a common law trust, appeared before and complained to the Interstate Commerce Commission of the matters and things of which it now complains to the court.

3. The plaintiff seeks to raise an issue between alleged so-called speculators or crooked competitors and alleged so-called regularly organized and established wholesale and retail lumber dealers over alleged evil and fraudulent practices in the manufacture and sale of lumber and not an issue between plaintiff and defendant over the power of the Interstate Commerce Commission to make and enter the report and order attached as Exhibit A and made part of the bill of complaint.

4. The bill of complaint with Exhibit A attached thereto and made part thereof is without equity on its face and does not state any cause of action against the defendant and the court may not grant the relief prayed or any part of the same.

5. It appears from the bill of complaint and Exhibit A attached thereto and made part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended, was authorized by the acts to regulate commerce and the transportation act of 1920, and that it was regularly made and entered by the Commission in a proceeding properly pending and conducted.

The plaintiff has not in and by the bill of complaint and
44 & 45 Exhibit A attached thereto and made part thereof shown that in making the order the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the plaintiff protected by the Constitution of the United States, or any other right of the plaintiff over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the bill of complaint and Exhibit A attached thereto and made part thereof, more fully to be pointed out on the hearing hereof, defendant prays that its motion be sustained and for such other and further order or action as may be appropriate.

CHARLES F. CLYNE,
United States Attorney.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

(Endorsed:) Filed June 13, 1922. John H. R. Jamar, Clerk.

46 And afterwards on, towit, the 15th day of June, 1922, this matter coming on to be heard, the following decree was entered by the Court:

47

Copy.

United States District Court, Northern District of Illinois, Eastern Division, Thursday, June 15, A. D. 1922.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff,

—.

UNITED STATES OF AMERICA, Defendants.

Before the Honorable George T. Page, Circuit Judge, and the Honorable George A. Carpenter and the Honorable F. A. Geiger, District Judges, Holding the Equity Court in Pursuance of Urgent Deficiencies Act of October 22, 1913.

Final Decree.

This cause came on to be heard at this Term on the motion of the United States to dismiss the bill of complaint and the same was

argued by counsel; whereupon it was ordered, adjudged and decreed as follows, viz:

First. That the motion of the United States to dismiss the bill of complaint, as amended, be and the same is hereby sustained.

Whereupon, in open court, the plaintiff, by its counsel, elected to stand on the bill of complaint, as amended, and to plead no further; whereupon it was further ordered, adjudged and decreed as follows, viz:

Second. That the bill of complaint, as amended be and the same is hereby dismissed at the cost of the plaintiff.

By the Court:

(Sgd.) GEO. T. PAGE,
United States Circuit Judge.

(Sgd.) CARPENTER,
United States District Judge.

(Sgd.) F. A. GEIGER,
United States District Judge.

June 15, 1922.

48 [Endorsed:] In Equity. No. 2724. In the District Court of the United States, Northern District of Illinois, Eastern Division. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, Plaintiff-, vs. United States of America; American Wholesale Lumber Association, Interstate Commerce Commission, Intervenors, Defendants. In Equity, No. 2724. Final Decree. William S. Bennet, Homer J. Smith, Edward W. McGrew, Solicitors for Complainant. Offices and Post Office Addresses: 10 South La Salle Street, Chicago, Illinois. Copy.

49 And on, to wit, the 11th day of July, 1922, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Petition for Appeal in words and figures following, to wit:

50 United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff,

vs.

UNITED STATES OF AMERICA; AMERICAN WHOLESALE LUMBER Association, Interstate Commerce Commission, Intervenors, Defendants.

Petition for Allowance of Appeal to United States Supreme Court.

To the Honorable the Judges of said Court, in Chancery Sitting:

The above named Plaintiff-, conceiving themselves to be aggrieved by the final decree of this Court made and entered on the 15th day of June, A. D. 1922, dismissing the above entitled suit, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error, which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, be forthwith transmitted to said Court.

Dated this 11th day of July, A. D. 1922.

WILLIAM S. BENNET,
HOMER J. SMITH,
EDWARD W. McGREW,
Solicitors for Plaintiff.

(Endorsed:) Filed July 11, 1922. John H. R. Jamar, Clerk.

51 [Endorsed:] In Equity, No. 2724. In the District Court of the United States, Northern District of Illinois, Eastern Division. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, Plaintiff, vs. United States of America; American Wholesale Lumber Association, Interstate Commerce Commission, Interv*ernos*, Defendants. Petition for Appeal. William S. Bennet, Homer J. Smith, Edward W. McGrew, Solicitors for Complainant, Offices and Post Office address: 10 South La Salle Street, Chicago, Illinois. In Equity, No. 2724. Copy.

52 And on, to wit, the 11th day of July, 1922, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Assignment of Error, in words and figures following, to wit:

53 Copy.

United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, TRUSTEES, Plaintiff-,

vs.

UNITED STATES OF AMERICA; AMERICAN WHOLESALE LUMBER Association, Interstate Commerce Commission, Intervenors, Defendants.

Assignment of Error.

Now comes the plaintiff, Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, by William S. Bennet, Homer J. Smith, and Edward W. McGrew, its solicitors, and files its assignment of error on appeal from the final decree made and entered on the 15th day of June A. D. 1922, in the above entitled case and assigns the following errors upon which they rely for grounds for reversal of said cause, to wit:

1. That the District Court erred in making and entering its final decree of June 15, 1922, in this cause dismissing the Bill of Complaint as amended on the grounds as prayed for in the motion of the United States to dismiss the said Bill of Complaint.

2. That the District Court erred in not entering a decree pursuant to the prayer of the said original and amended Bill of Complaint.

3. That the District Court erred in not adjudging and decreeing that the Plaintiff herein has, as a matter of right and law, the right and privilege, under the statute of the United States in such case made and provided, to appear before three Judges of said court sitting on banc and ask for a temporary restraining order and the said injunction as prayed for restraining the enforcement of the said order of the Interstate Commerce Commission dated
54 February 11, 1922.

4. That the District Court erred in not granting the order for a temporary restraining order and an interlocutory injunction prayed for in said original and amended Bill of Complaint because the records shows the existence of such irreparable injury to the plaintiff as legally to justify the issuance of such said temporary restraining order and interlocutory injunction as prayed for.

5. That the District Court erred in not adjudging and decreeing that said original and amended Bill of Complaint with Exhibit "A"

attached thereto is not vague, indefinite, uncertain and insufficient but on the contrary evidences the fact that said plaintiff has a pecuniary, common or general interest in the subject matter and is directly affected by the said order for the Interstate Commerce Commission dated February 11, 1922, as to entitle plaintiff to a standing in a court of equity and to maintain this proceeding.

6. That the District Court erred in not adjudging and decreeing that it was not incumbent upon the Edward Hines Yellow Pine Trustees, a common law trust, as a condition precedent to its right of action in said court to first appear before, and complain to the Interstate Commerce Commission of the matters and things it complains to said court.

7. That the District Court erred in dismissing said Bill of Complaint for want of equity as said court in Chancery sitting should mold its remedies to meet conditions with which it has to deal.

8. That the Court erred in not adjudging and decreeing that the said order of the Interstate Commerce Commission is plainly erroneous as a matter of law when considered in connection with said Commission's report because said order is wholly unsupported by the ascertained and undisputed facts as found and recited in the Commission's said report.

9. That the District Court erred in not adjudging and decreeing that the administrative fiat of the Interstate Commerce Commission is arbitrary and transcends the legitimate bounds of its au-
55 thority as it in effect results in unjust discrimination and unreasonable preference to certain shippers; said unlawful discrimination being prohibited by the Act to Regulate Commerce.

10. That the District Court erred in not adjudging and decreeing that said order of the Interstate Commerce Commission is null and void as, by not operating on all alike, it is violative of due process of law and prohibited by the Constitution of the United States.

11. That the District Court erred in not adjudging and decreeing that the said order of the Interstate Commerce Commission is null and void in toto as it attempts to deprive plaintiff of its property without due process of law.

12. That the District Court erred in not adjudging and decreeing that the said order of the Interstate Commerce Commission is null and void as it attempts to prevent the carriers subject to the Act to Regulate Commerce from making a reasonable charge for the detention and use of their property and interferes with the constitutional right of said carriers to the use of their own property, and compels the said carriers to permit the use of their said property without compensation in violation of the Fifth Amendment of the Constitution of the United States.

13. That the District Court erred in not adjudging and decreeing that the said order of the Interstate Commerce Commission of

February 11, 1922, is null and void and of no effect because not within any jurisdiction granted to the Interstate Commerce Commission under an Act to Regulate Commerce of February 4, 1887, or any Act amendatory thereof or supplementary thereto conferring jurisdiction on the Interstate Commerce Commission.

In order that the foregoing Assignment of Error may be and appear of record the Plaintiff presents the same to the Court and prays that such disposition be made thereof as in accordance with the law and statutes of the United States in *in* such cases
56 made and provided, and Plaintiff herein prays reversal of the order and final decree made and entered by said Court on the 15th day of June A. D. 1922.

WILLIAM S. BENNET,
HOMER J. SMITH,
EDWARD W. McGREW,
Solicitors for Plaintiff.

Dated this 11th day of July A. D. 1922.

(Endorsed:) Filed July 11, 1922. John H. R. Jamar, Clerk.

57 [Endorsed:] In Equity, No. 2724. In the United States District Court, Northern District of Illinois, Eastern Division. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe and L. L. Barth, Trustees, Plaintiff-, vs. United States of America; American Wholesale Lumber Association, Interstate Commerce Commission, Defendants. In Equity, No. 2724. Assignment of Error. William S. Bennet, Homer J. Smith, Edward W. McGrew, Solicitors for Plaintiff. Offices and Post Office Addresses: 10 So. La Salle St., Chicago, Ill. Copy.

58 And afterwards, on to wit, the 11th day of July, 1922, this matter coming on to be heard, the following order was entered by the Court:

59 United States District Court, Northern District of Illinois, Eastern Division.

Tuesday, July 11, A. D. 1922.

Present: Honorable George T. Page, Circuit Judge.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff-,

vs.

UNITED STATES OF AMERICA, AMERICAN WHOLESALE LUMBER Association, Interstate Commerce Commission, Intervenors, Defendants.

Order.

Now comes the plaintiff, and it appearing to the said Court that a petition for appeal and Assignment of Error have been filed herein;

It is ordered that an appeal to the Supreme Court of the United States from the decree entered herein on the 15th day of June, A. D. 1922, be and the same is allowed and that for the purpose of enabling said Court to decide said appeal, a transcript of the record before the Court herein be forthwith transmitted to said Court; and that Plaintiff file their appeal bond in the sum of Two Hundred and Fifty Dollars ($250.00), to be signed by at least two of said Plaintiff trustees herein.

By the Court.

(Sgd.) GEO. T. PAGE,
U. S. Cir. Judge.

Dated this 11th day of July, A. D. 1922.

60 [Endorsed:] Copy. In the District Court of the United States for the Northern District of Illinois, Eastern Division. In Equity, No. 2724. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, Plaintiff-, vs. United States of American, American Wholesale Lumber Association, Interstate Commerce Commission, Intervenors, Defendants. In Equity No. 2724. Order Allowing Appeal. William S. Bennett, Homer J. Smith, Edward W. McGrew, Solicitors for Complainant. Offices and Post Office Address: 10 South La Salle Street, Chicago, Illinois. Copy.

60½ And on to wit, the 11th day of July, 1922, came Plaintiff, as principal, and Edward Hines and L. L. Barth of the City of Chicago, County of Cook, and State of Illinois, as sureties, and filed in the office of the Clerk of said Court a certain Bond on Appeal in words and figures following, to wit:

61 Know all men by these presents, That we, Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, as principal-, and Edward Hines and L. L. Barth, of the City of Chicago, County of Cook, and State of Illinois, as sureties, are held and firmly bound unto United States of America in the full and just sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this Tenth day of July in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court, between Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe and L. L. Barth, Trustees, plaintiff-, and United States of America, Defendant, and American Wholesale Lumber Association and Interstate Commerce Commission, Intervenors, defendant-, a decree was rendered against the said Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, and the said Plaintiff, having obtained from said Court an order allowing an appeal to the United States Supreme Court and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said Unites States of America, American Wholesale Lumber Association and Interstate Commerce Commission, citing and admonishing them to be and appear at the United States Supreme Court to be holden at Washington, D. C., within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Sgd.) EDWARD HINES. [SEAL.]
(Sgd.) L. L. BARTH. [SEAL.]

Sealed and delivered in presence of—
(Sgd.) C. R. NELSON.
(Sgd.) E. W. McGREW.

Approved by—
(Sgd.) GEO. T. PAGE,
Cir. Judge.

(Endorsed:) Filed Jul. 11, 1922. John H. R. Jamar, Clerk.

62 [Endorsed:] In Equity. No. 2724. United States District Court, Northern District of Illinois, Eastern Division. Edward Hines Yellow Pine Trustees: C. F. Wiehe, and L. L. Barth, Trustees, Appellant, vs. United States of America, American Wholesale Lumber Association, Interstate Commerce, Appellees. Bond on Appeal.

63 Copy.

United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 2724.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE, and L. L. BARTH, Trustees, Plaintiff-,

vs.

UNITED STATES OF AMERICA; AMERICAN WHOLESALE LUMBER Association, Interstate Commerce Commission, Intervenors, Defendant-.

Præcipe.

To Honorable John H. R. Jamar, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

You will please prepare a true copy and authenticated transcript of the record to be filed in the Unitee States Supreme Court pursuant to an appeal allowed in the above entitled cause and to include in such transcript the following:

(1) Bill of Complaint.

(2) Motion to Amend Bill of Complaint.

(3) Order allowing said Amendment to Bill.

(4) Defendants' motion to dismiss Bill of Complaint.

(5) Final decree dismissing Bill of Complaint as amended.

(6) Petition for Appeal.

(7) Order Allowing Appeal.

(8) Præcipe.

(9) Bond on Appeal.

(10) Assignment of Errors.

(11) Citation on Appeal.

(Sgd.) WILLIAM S. BENNET,
(Sgd.) HOMER J. SMITH,
(Sgd.) EDWARD W. McGREW,
Solicitors for Plaintiff.

Dated this 11th day of July A. D. 1922.

64 & 65 *Affidavit.*

STATE OF ILLINOIS,
County of Cook, ss:

On this 14th day of July A. D. 1922, personally appeared William S. Bennet, before me the subscriber, Joseph L. Scala, a Notary Public, duly commissioned in and for the County of Cook, State of Illinois, and makes oath that he delivered a true copy of the within Præcipe to the Attorney General of the United States, leaving a copy in his office in the room of Blackburn Esterline in the Department of Justice, Washington, D. C.

Deponent further states that he also delivered a true copy of said Præcipe to P. J. Farrell, Chief Counsel of the Interstate Commerce Commission, Washington, D. C., and also delivered a true copy of said Præcipe to Davies & Jones, Solicitors of the American Wholesale Lumber Association, by leaving the same with the person in charge of their office in the Southern Building, Washington, D. C.

All three of said services being made in the City of Washington, D. C. on July 13th, A. D. 1922.

(Sgd.) WILLIAM S. BENNET.

Subscribed and sworn to before me this 14th day of July, A. D. 1922.

[Seal of Joseph L. Scala, Notary Public, Cook County, Ill.]

(Sgd.) JOSEPH L. SCALA,
Notary Public.

My Commission expires February 7th, 1926.

(Endorsed:) Filed Jul. 21, 1922. John H. R. Jamar, Clerk.

66 [Endorsed:] In equity. No. 2724. In the District Court of the United States for the Northern District of Illinois, Eastern Division. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, Plaintiff-, vs. United States of America, American Wholesale Lumber Association, Interstate Commerce Commission, Intervenors, Defendants. In Equity, No. 2724. Præcipe. William S. Bennet, Homer J. Smith, Edward W. McGrew, Solicitors for Plaintiff. Offices and Post Office Addresses: 10 South La Salle St., Chicago, Illinois. Copy.

67 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled Edward Hines Yellow Pine Trustees, Ed-

ward Hines, C. F. Wiehe, and L. L. Barther, Trustees, vs. United States of America, as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of July, A. D. 1922.

[Seal of District Court U. S., Northern Dist., Illinois, 1855.]

JOHN H. R. JAMAR,
Clerk.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to An Appeal duly obtained from a decree of the District Court of the United States, filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Edward Hines Yellow Pine Trustees; C. F. Wiehe, and L. L. Barth, Trustees, are the Appellants, and you are Appellee to show cause, if any there be, why the said Decree rendered against the said Appellant as in the said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. T. Page, Judge of the Circuit Court of the United States, this 11th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

GEO. T. PAGE,
Cir. Judge.

Due and Sufficient Service of the Within Citation is Hereby Accepted.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
7/13/22.

69 [Endorsed:] No. —. Supreme Court of the United States. Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe, and L. L. Barth, Trustee Appellant, vs. United States of America, American Wholesale Lumber Association, Interstate — Commission, Appellees. Citation to the Supreme Court of the United States. Filed July 21, 1922, at — o'clock — M. John H. R. Jamar, Clerk.

On this 14th day of July, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared before me, the subscriber, Joseph L. Scala a Notary Public duly commissioned in

and for the County of Cook, State of Illinois; William S. Bennet and makes oath that he delivered a true copy of the within citation to the Interstate Commerce Commission by leaving a copy thereof in the office of their General Solicitor, P. J. Farrell, Washington, D. C., on the 13th day of July, A. D., 1922.

WILL. S. BENNET.

Sworn to and subscribed the 14th day of July A. D. 1922.

[Seal of Joseph L. Scala, Notary Public, Cook County, Ill.]

JOSEPH L. SCALA,
Notary Public.

My Commission Expires February 7th, 1926.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to An Appeal duly obtained from a decree of the District Court of the United States, filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe and L. L. Barth, Trustees, are the Appellants, and you are Appellee to show cause, if any there be, why the said Decree rendered against the said Appellant as in the said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. T. Page, Judge of the Circuit Court of the United States, this 11th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

GEO. T. PAGE,
Cir. Judge.

Due and Sufficient Service of the Within Citation is Hereby Accepted.

____ ____,
Attorney General of the United States.

71 On this 14th day of July, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared before me, the subscriber, Joseph L. Scala a Notary Public duly commissioned in and for the County of Cook, State of Illinois; William S. Bennet, and makes oath that he delivered a true copy of the within citation to the United States of America by leaving a copy thereof in the office of Blackburn Esterlive, in the office of the Department of Justice, Washington, D. C., July 13th, 1922.

WILL' S. BENNET.

Sworn to and subscribed the 14th day of July A. D. 1922.

[Seal of Joseph L. Scala, Notary Public, Cook County, Ill.]

JOSEPH L. SCALA,
Notary Public.

My Commission Expires February 7th 1926.

[Endorsed:] No. —. Supreme Court of the United States. Edward Hines Yellow Pine Trustees: Edward Hines, C. F. Wiehe and L. L. Barth, Trustees, Appellant-, vs. United States of America, American Wholesale Lumber Association, Interstate Commerce Commission, Appellees. Citation to the Supreme Court of the United States. Filed July 21, 1922, at — o'clock — M. John H. R. Jamar, Clerk.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to American Wholesale Lumber Association, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to An Appeal duly obtained from a decree of the District Court of the United States, filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, are the Appellants, and you are Appellee to show cause, if any there be, why the said Decree rendered against the said Appellant as in the said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. T. Page, Judge of the Circuit Court of the United States, this 11th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

GEO. T. PAGE,
Cir. Judge.

Due and Sufficient Service of the Within Citation is Hereby Accepted.

DAVIES & JONES,
Solicitor- for American Wholesale Lumber Association.

73 & 74 On this 14th day of July, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared before me, the subscriber, Joseph L. Scala, a Notary Public duly commissioned in and for the County of Cook, State of Illinois; William S. Bennet, and makes oath that he delivered a true copy of the within citation to The American Wholesale Lumber Association,

by leaving a copy thereof in the office of their Solicitors, Davies & Jones, Southern Building, Washington, D. C., on July 13, 1922.

WILL. S. BENNET.

Sworn to and subscribed the 14th day of July A. D. 1922.

[Seal of Joseph L. Scala, Notary Public, Cook County, Ill.]

JOSEPH L. SCALA,
Notary Public.

My Commission Expires February 7th, 1926.

[Endorsed:] No. —. Supreme Court of the United States. Edward Hines Yellow Pine Trustees; Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, Appellant-, vs. United States of America, American Wholesale Lumber Association, Interstate Commerce Commission, Appellees. Citation to the Supreme Court of the United States. Filed July 21, 1922, at —- o'clock — M. John H. R. Jamar, Clerk.

Endorsed on cover: File No. 29,065. N. Illinois D. C. U. S. Term No. 515. Edward Hines Yellow Pine Trustees, Edward Hines, C. F. Wiehe, and L. L. Barther, Trustees, appellants, vs. The United States of America, The Interstate Commerce Commission, and American Wholesale Lumber Association. Filed July 31st, 1922. File No. 29,065.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1923.

No. 91

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE AND L. L. BARTH, TRUSTEES,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN WHOLESALE LUMBER ASSOCIATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

WILLIAM S. BENNET,
HOMER J. SMITH,
EDWARD W. McGREW,
Solicitors for Appellants.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

	PAGE
Statement of the Case	1
The Issue—"Whether the Bill of Complaint contains any cause of action upon which the Appellant was entitled to any relief"	1
Bill of Complaint—Alleges facts to show that as a shipper and as owner of a railroad, Appellant will suffer irreparable injury by this order of the Commission, and that Appellant has the right to bring this action	2
Alleges facts to show the recognized evils of the Transit Car	2-7
Final Decree—Entered June 15, 1922 (without written opinion), sustained motion of United States to dismiss Bill of Complaint	7
Appeal to United States Supreme Court	6
Specification of Errors—Setting forth specifically and particularly each of the thirteen errors assigned	8-10
Brief of the Argument	11
Facts in Bill of Complaint—Must be taken as true, where final decree is entered on motion to dismiss	11
Exhibit "A"—Attached to Bill of Complaint, is to be considered with the Bill on motion to dismiss	11
Equity Rule No. 29—Bill cannot be dismissed on motion, without answer, unless for "misjoinder, nonjoinder or insufficiency of fact to constitute a valid cause of action in equity," appearing on the face of the bill	12

Rights of Appellant have been infringed..... 12
Shippers right to maintain action where order of the Commission interferes with his rights..... 13
Motion to Dismiss by United States—Reasons why none of the five grounds are justified by the record.....15-20
Diffenbaugh Case (242 U. S. 217) is controlling as to second ground for motion to dismiss... 17
Common carrier status of Appellant..... 22
Certificate of Public Convenience and Necessity, issued by Commission (79 I. C. C. 515)..... 22
Appellant is merely acting in a representative capacity in bringing this suit. Parties irreparably injured by Commission's order too numerous to bring them all before the Court in this suit 24
The amount and extent of the carrier's business is not the real criterion as to whether or not it is a common carrier..... 23
Determination of whether a common carrier, upon undisputed facts, is a question of law.. 23
Order of the Commission—Appellant's general statement as to why this order of the Commission is invalid 26
Appellant agrees with every finding of fact of the Commission. Commission's order is invalid, as a matter of law; is not supported by any evidence 27-34-64
The order of the Commission is to be read in connection with its report of which it forms a part 30
The order of the Commission is broader than the issue before it. The evidence was directed solely to the lawfulness of the charge..... 64

The order of the Commission creates unjust discrimination 37-45
The order of the Commission is not in the public interest so as to keep the railroad in effective operation 45
Appellant, on this appeal, relies on the Commission's finding of fact 35
Carriers have never been deprived of their common law right to initiate tariffs 35
The Commission's order in this case is not consistent with its former rulings 46-52
Bureau of Forestry recognized the evils of the Transit Car in its report on Senate Resolution 311—66th Congress 54
The function of a railroad is transportation, not storage 56
The Commission, by its order, is compelling railroads to function both as a common carrier and as a warehouseman 61
The only issue before the Commission was whether this $10 charge "was unreasonable, unjustly discriminatory and unduly prejudicial," and, therefore, unlawful 65
The evidence before the Commission "was directed solely to the lawfulness of the charge" 65
The Conclusion of the Commission, "there is now a large surplus of serviceable empty cars and, generally speaking, no congestion in the country"—is an arbitrary finding, and, therefore, void 64
The order of the Commission also results in a violation of the 5th Amendment to the Constitution of the United States 68
Conclusion 71

List of Cases Cited.

PAGE

Akron C. & Y. Ry. Co. v. United States, U. S. Sup. Ct. Rep. 308; 67 L. Ed. 308 45

Alabama Great Southern Ry. Co. v. Wood, 90 So. 502; 19 A. L. R. 978 60

American Paper & Pulp Assn. v. B. & O. Ry. Co. 41 I. C. C. 506, 512 29

Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 220 30

Baltimore & O. Ry. Co. v. Lambert Run Coal Co. 267 Fed. 776, 779 35

Baltimore & O. Ry. Co. v. Voigt, 176 U. S. 498; 44 L. Ed. 560; 20 Sup. Ct. Rep. 385 57

Buchanan v. Warley, 245 U. S. 60, 74 71

Carroll v. Carroll, 16 How. 287 66

Caldwell v. Richmond & D. R. Co. 87 Ga. 550, 15 S. E. 678 23

Car Peddling Case, 45 I. C. C. 494, 500 ..... 29, 50

Car Shortage Case, 12 I. C. C. 561, 570 and 579 51

Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. 245 Fed. 917 62

Chicago, M. & St. P. Ry. v. Wallace, 66 Fed. 506 58

Chicago, M. & St. P. Ry. v. Hartshorn, 30 Fed. 541 .. 11

Chicago & N. W. Ry. Reconsignment Rules, 29 I. C. C. 620, 623 48

City of St. Louis v. The Knapp Stout Co. 104 U. S. 658; 26 L. Ed. 883 ..... 16, 26

Cleveland C. C. & St. L. Ry. v. Dettlebach, 239 U. S. 588 61

Continental Securities Co. v. Interborough Rapid Transit Co. 165 Fed. 945 11

Coal from Arkansas and Other States, 49 I. C. C. 727 48
Crocker v. Malley, 249 U. S. 223, 67 L. Ed. 174.... 16
C. & C. Co. *et al.* v. C. S. Ry. Co. *et al.* 16 I. C. C. 387 51

Detroit Traffic Assn. v. L. S. & M. S. Ry. Co. 21 I. C. C. 257, 261 49
Dietz Lumber Co. v. A. T. & S. F. Ry. 22 I. C. C. 75.. 52
Dodge Bros. v. Director General, 62 I. C. C. 689.... 43
Doran v. Nashville C. & St. L. Ry. Co. 33 I. C. C. 526, 529 51

Edward v. Bay State Gas. Co. 91 Fed. 946..... 11
Empire Refineries v. Guaranty Trust Co. 271 Fed. 668 64

Farmers Loan & Trust Co. v. Northern Pac. Ry. 83 Fed. 249, 252 53
Florida E. Coast R. R. v. United States, 234 U. S. 167, 58 L. Ed. 1267.....35, 67

Graseli Chemical Co. v. Aetna Explosives Co. 252 Fed. 456; 129 C. C. A. 380..... 20
Guaranty Claim of Central Elevator Co. 72 I. C. C. 175, 176 63

Huffman Bros. Motor Co. v. N. Y. C. Ry. Co. 74 I. C. C. 671, 672 43

Interstate Commerce Commn. v. Diffenbaugh, 242 U. S. 42, 49; 56 L. Ed. 83, 88.....13, 17
Interstate Commerce Commn. v. C. R. I. & P. Ry. 218 U. S. 88, 103, 109; 54 L. Ed. 946, 954.....24, 38
Interstate Commerce Commn. v. L. & N. Ry. 227 U. S. 88; 57 L. Ed. 431..... 35
Interstate Commerce Commn. v. Union Pac. Ry. 222 U. S. 541; 56 L. Ed. 308, 311.....35, 67

Interstate Commerce Commn. v. B. & O. Ry. 225 U. S. 326 44
Interstate Commerce Commn. v. L. & N. Ry. 73 Fed. 409, 419, 420 ..... 53, 67
Interstate Commerce Commn. v. Stickney, 215 U. S. 98, 3 Sup. Ct. 66, 54 L. Ed. 70
Interstate Commerce Commission v. I. C. Ry. 215 U. S. 452; 54 L. Ed. 280; 30 Sup. Ct. Rep. 155 70

Kaul Lumber Co. v. Central of Ga. Ry. 20 I. C. C. 450, 456 23
Kidson & Co. v. D. L. & W. Ry. Co. 74 I. C. C. 135, 139 43

Lake Shore & M. S. Ry. v. Smith, 173 U. S. 684, 690 .. 70
Leases and Grants by Carriers to Shippers, 73 I. C. C. 671, 672 44
Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397; 32 L. Ed. 788; 9 Sup. Ct. Rep. 469 57

McLean Lumber Co. v. United States, 237 Fed. 460 ..... 13, 18
Masker & Co. v. Lehigh Valley Co. 236 U. S. 412; 59 L. Ed. 644 67
Maeder v. Buffalo Bills Wild West Co. 132 Fed. 280 11
~~Merchants' & Manufacturers' Traffic Assn. v. United States, [illegible] Fed. 292, 294.~~ ..... ~~13, 18~~

Memphis & L. Ry. Co. v. Southern Exp. Co. 117 U. S. 1; 29 L. Ed. 791; 6 Sup. Ct. Rep. 542, 628 57
Missouri K. & T. Ry. Co. v. I. C. C. 164 Fed. 645, 648 70
Monongahela Co. v. United States, 148 U. S. 312, 343 71

New Orleans Storage Rules, 28 I. C. C. 605 49
New York Storage, 47 I. C. C. 141 52

New York C. R. Co. v. Lockwood, 17 Wall. 357; 21 L. Ed. 627 57
Norfolk & Western R. R. v. Adam Clement, 221 L. R. A. 530, 534 61
Northern Potato Traffic Assn. v. Gr. Nor. Ry. Co. 58 I. C. C. 360 42

Ocmulgee River Lumber Co. v. Ocmulgee Valley Lumber Co. 251 Fed. 161 25
Oklahoma v. Kansas Nat. Gas Co. 221 U. S. 229, 253 71

Peavy & Co. v. U. P. R. Co. 176 Fed. 409, 418 (Aff. in 222 U. S. 42) 70
Pennsylvania R. R. v. Labor Board, 261 U. S. 72 53
Philadelphia & Reading v. United States, 240 U. S. 334; 60 L. Ed. 675 67
Pittsburg & Ohio Mining Co. *et al.* v. B. & O. 40 I. C. C. 409 48

Reconsignment Case 47, Interstate Commerce Commission, 590, 633, 624 ..... 40, 50
Rockford Fuel & Lumber Co. *et al.* Docket No. 10, Tentative Rep. 52
Rush v. French, 25 Pacific 816, 825, 828 66

Santa Fe P. & P. R. Co. v. Grant Bros. Construction Co. 228 U. S. 177; 57 L. Ed. 787; U. S. Sup. Ct. Rep. 474 57
Seaboard Air Line R. Co. v. New Orleans Export R. Co. 271 Fed. 861 43
Security Insurance Co. v. Prewitt, 200 U. S. 446; 50 L. Ed. 545 68
Stewart v. Masterson, 131 U. S. 158; 33 L. Ed. 116 .. 11
Strawbery Hill v. C. M. & St. P. Ry. 41 Fed. 568 ... 11
St. Louis Hay & Grain Co. v. M. & O. Ry. *et al.* 11 I. C. C. 90 51

Tap Line Cases, 234 U. S. 1; 58 L. Ed. 1185..... 23
Tilden v. Barber, 227 Fed. 1010..... 12
Tyler v. Judges, 179 U. S. 409; 45 L. Ed. 254..... 68

Union Pacific Ry. v. Updike Grain Co. 222 U. S. 215.. 39
United States v. Erie Ry. Co. 166 Fed. 352.....57, 58

Wilson Produce Co. v. Penn. Ry. Co. 14 I. C. C. 170, 175 .....49, 50
Woodruff, 96 Fed. 317, 321..... 67

Elliott on Railroads, 3rd Ed. Sec. 2297..... 59
Elliott on Railroads, 3rd Ed. Sec. 2322..... 59
Elliott on Railroads, 3rd Ed. Sec. 2210.....
Elliott on Railroads, 2nd Ed. Sec. 1396..... 57
Elliott on Railroads, 2nd Ed. Sec. 642..... 58

Foster's Federal Practice, 6th Ed. Sec. 366..... 11
Foster on Equity Practice, 6th Ed. Sec. 367..... 11

Simkins on Federal Practice, page 672 (1923)..... 11

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1923.

No. 91.

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE AND L. L. BARTH, TRUSTEES,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN WHOLESALE LUMBER ASSOCIATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

Statement of the Case.

The case comes before the court on an appeal from a final decree granting the motion of the United States to dismiss the bill of complaint as amended. The sole question presented, therefore, is whether the bill of complaint contains any cause of action upon which the appellant was entitled to any relief.

Stated briefly, the bill of complaint sets out that the appellant was, at the time of the verification of the bill, a

common law trust, engaged in operating a lumber manufacturing enterprise in the southern part of the State of Mississippi, and just completing a railroad between the Cities of Lumberton and Kiln, Mississippi, which railroad the appellant intended operating as a common carrier of freight. The appellant set out in some detail, frauds which had arisen in the lumber industry, including false billing and the selling of one grade and the delivery of another, aggravated by the fact that because of the war large industrial purchasers had had their men skilled in the knowledge of grades of lumber and tallying same, quite largely withdrawn and, after the war, their places filled by less well trained, and, in some instances, less loyal men, while, at the same time, owing to the highly competitive nature of the lumber business, a class of speculators had recently come into the business who owned neither plants nor yards, and without any particular investment or interest in the lumber business, used it as a means of making money by speculating in its product; that this speculation has lead to the fraudulent practice already alluded to, the existence of which had become so well recognized that the Southern Pine Association in the City of New Orleans on March 30, 1922, took steps to stop the practices; that Secretary Hoover, of the Department of Commerce, on April 14, 1922, in a public speech in the City of Chicago, requested the National Lumber Manufacturers' Association to take upon itself the duty of giving a brand to lumber to show its content and grade; that on April 5, 1922, the National Lumber Manufacturers' Association, at its annual meeting in the City of Chicago, indorsed the position of Secretary Hoover and adopted resolutions to put the same into effect (Trans., 8), which action was followed on the 6th and 7th days of April, 1922, at a well attended meeting of lumbermen comprising representatives of

manufacturers, wholesalers and retailers, which meeting formed itself into a permanent organization to be known as the "American Lumber Congress," and adopted resolutions substantially similar to those adopted by the National Lumber Manufacturers' Association, with the addition of the following:

> "We believe in fair dealing, honest grades and the fulfillment of all obligations and contracts." (Bill of Complaint, Trans. 8.)

Following the recital of these dishonest practices in the lumber industry and their almost universal condemnation the bill of complaint sets out that one of the instrumentalities which lends itself to the practices condemned is what is known as the "Transit Car," and in the bill of complaint (Trans., 8 and 9), a description of the transit car and its injurious effect, both on the large mill (to which class of mills both of the mills of the appellant belong which cuts ten million feet and over annually), and the small mill (which cuts less than that amount) showing the damage to the appellant as the owner of two large mills by the transit car, to be:

First, that it provides a means to misdescribe grades and to misstate the number of feet in a car;

Second, that the "Speculator," with his Transit Car, makes it difficult for large industries (of which the appellant is one) to make calculations in connection with customers, who with the manufacturers are entitled to the ordinary and general use of the equipment of the railroads so far as the transportation of lumber is concerned, as the Speculators who use the Transit Car, when prices are advancing, keep the cars on the rails without delivery until, in their opinion, the highest price obtainable has been reached, thus depriving the great bulk of the lumber industry of the legitimate use of railroad equipment, and, as pointed out by the Commission

in its opinion (Trans., 29), which is made a part of the bill of complaint,

> "On a falling market, the consumer defers purchase."

That the large mills, to which class those of the appellant belong, are those which are obeying the widespread demand for conservation of timber, by putting in planing mills, cutting up plants for the manufacture of short lengths for boxes, broom handle factories for the manufacture of broom handles and other plants for the utilization of those portions of the log and lower grades of timber which are necessarily wasted by the small mill.

The bill of complaint also states the injury which the Transit Car does to the small mill, but as the mills of the appellant are large mills, this portion of the bill of complaint must be regarded as merely illustrative:

The bill of complaint then shows (Trans., 10) that the Director General of Railroads, during the Federal Administration, on October 20, 1922, instituted the so-called penalty charge of ten dollars per car for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment at the point to which they were originally consigned, beyond forty-eight hours after the hour at which free time began to run under the demurrage rules in force on their respective railroads.

The bill then sets out the following:

On September 10, 1920, a complaint was filed with the Interstate Commerce Commission by the American Wholesale Lumber Association, known as No. 11818, and on February 11, 1922, the Commission made its decision (which decision is made a part of the bill of complaint), which decision closed with an order requiring the railroads of the United States to cease and desist

on or before March 13, 1922, and thereafter to abstain from publishing, demanding or collecting the penalty charge of $10 a day on lumber and other forest products held for reconsignment beyond forty-eight hours after the hour at which free time begins to run under the demurrage rules. This despite the fact that the Commission in its decision had found that the penalty charge was warranted, was not unreasonable or otherwise unlawful; that the Transit Car was an evil in that it delayed railroad equipment in transportation service very materially so far as lumber was concerned; that while there was, at the date of the decision on the 11th day of February, 1922, a large surplus of serviceable empty cars and, generally speaking, no congestion in the country, that in the past car shortages at times have followed quickly upon periods of car surplus, and that it was impossible to forecast the continuance of present conditions or what would be the conditions when the normal stride of business was reached. The order which follows the conclusion of a well reasoned opinion is in no way sustained by the findings:

> "We are of the view that there is no justification for the charge at the present time, and we find that while the present conditions continue, it is and will be unreasonable." (Trans., 29.)

In the sixth paragraph of the bill, the appellant points out that the order of the Commission based upon this conclusion without support of the findings of fact, prevented the railroads, including, of course, the common carrier about to be put in operation by the appellant, from taking the necessary steps to join the great bulk of the lumber industry, including the appellant, in the suppression of the evil and dishonest practices which have been heretofore referred to and set out, and that the Commission exceeded its jurisdiction in holding that

it had a right to prevent railroad companies from charging rental for their idle equipment not being used in connection with the business of transportation.

That the Commission held without right, that the mere fact that the railroad equipment was idle and without prospect of then present use in connection with its function of moving freight, permitted any person who had theretofore engaged such equipment for purposes of traffic and transportation to continue to use it without payment to the railroad company, for warehouse and storage purposes; that in these respects the Commission acted without authority.

That not only did the order of the Commission prevent the railroads from joining the lumber industry in the suppression of dishonest practices but compelled the railroad companies, including that of the appellant, to lend its equipment to unfair competition, which unfair competition is described in the bill (Trans., 11), and this statement is reiterated in another form in paragraph 8 of the bill of complaint (Trans., 12).

The bill of complaint thus sets out a substantial injury to the appellant as the owner of two large lumber mills, each manufacturing more than ten million feet of lumber a year, and as the owner of a railroad then about to be operated as a common carrier of freight by railroad within the State of Mississippi.

Since the purpose of the bill was to enjoin the enforcement of an order made by the Interstate Commerce Commission, proceedings were had pursuant to the jurisdiction and practice fixed for the Commerce Court under Sections 207, 208 and 209 of the Judicial Code (Comp. Stat. #993, 996 & 997—36 Stat. 539) and the Urgent Deficiencies Act approved October 22, 1913 (U. S. Comp. Stat. 988—38 Stat. 219).

Pursuant to the latter section, a motion for a preliminary injunction regularly came on to be heard before three judges of the Federal Court. On such hearing the Interstate Commerce Commission and American Wholesale Lumber Association were permitted to intervene and to join in the motion made by the United States to dismiss the bill. It was mutually agreed by counsel for all the parties that the hearing upon the motion and upon the bill as amended should be treated as a final hearing and that a final decree might be entered thereon. On June 15, 1922, a final decree was entered (without written opinion) sustaining the motion to dismiss the bill of complaint as amended, whereupon, in open court, the plaintiff, by its counsel, elected to stand on the bill of complaint as amended, whereupon the court dismissed the same at the cost of the plaintiff.

This case has now been appealed to the United States Supreme Court under the said act of October 22, 1913.

SPECIFICATION OF ERRORS.

As the final decree was entered on dismissal of the complaint and as no opinion was filed, appellant is not advised as to the ground or grounds upon which the complaint was dismissed, as the motion may have been granted on any one of the five grounds set out in the motion of the United States.

Therefore, the first assignment of error is made broad enough to cover a dismissal of the complaint on any of the grounds prayed for in the motion.

The second, that the court erred in not entering a decree in accordance with the bill.

The third, deals with the refusal of the temporary restraining order involved in the dismissal of the bill.

The fourth, with the refusal to grant not only the temporary restraining order but the interlocutory injunction, because the bill of complaint shows irreparable injury to the appellant.

The fifth assignment of error, deals specifically with the point most vigorously pressed in the argument below by the United States, that is, that the bill of complaint was "vague, indefinite, uncertain and insufficient," this being the first ground of the motion below, the assignment of error being that the bill of complaint evidences the fact that the appellant has a pecuniary, common or general interest in the subject matter and is directly affected by said order of the Interstate Commerce Commission, dated February 11, 1922, so as to entitle the appellant to a standing in a court of equity and to maintain this proceeding.

The sixth assignment is based upon the error of the

District Court involved in the dismissal of the complaint, which dismissal may have been on the ground of the motion that it does not appear from the bill of complaint that the plaintiff had brought a complaint before the Interstate Commerce Commission.

The seventh assignment of error relates to the fourth ground set out in the motion to dismiss, that is the bill of complaint, with Exhibit A attached thereto and made a part thereof, is without equity on its face, does not state any cause of action. As the District Court may have dismissed the bill upon this ground, its action in so doing is assigned as an error.

The eighth assignment of error is that the Order of the Interstate Commerce Commission is erroneous because wholly unsupported by the ascertained and undisputed facts as found and recited in the Commission's said report.

The ninth assignment is that the District Court erred in not adjudging and decreeing that the administrative fiat of the Interstate Commerce Commission has arbitrarily transcended the legitimate bounds of its authority.

The tenth assignment of error is that the District Court erred in not adjudging and decreeing that the order of the Interstate Commerce Commission is null and void because violative of due process of law and prohibited by the Constitution of the United States.

The eleventh, that the District Court erred in not decreeing said order of the Interstate Commerce Commission as null and void in toto, as it attempts to deprive appellant of its property without due process of law.

The twelfth, is that the District Court erred in not ad-

judging and decreeing that the order of the Interstate Commerce Commission is null and void in that it attempts to prevent the carriers, subject to the Act to Regulate Commerce, from making a reasonable charge for the detention and use of the property and interferes with the constitutional rights of the carriers to the use of their own property and compels them to permit the use of their property without compensation in violation of the Fifth Amendment of the Constitution of the United States.

The thirteenth assignment is that the District Court erred in not adjudging and decreeing that the order of the Interstate Commerce Commission of February 11, 1922, is null and void, because not within any jurisdiction granted to the Interstate Commerce Commission under any law.

BRIEF OF THE ARGUMENT.

(1) The Final Decree Having Been Entered on Motion to Dismiss, the Facts Stated in the Bill of Complaint Must Be Taken to Be True.

A motion to dismiss, like a demurrer, admits the truth of the allegations of fact in the bill:

Foster's Federal Practice, 6th Ed. Sec. 366.

Simkins on Federal Practice, page 672 (1923), and cases cited therein.

(2) If It Appears That the Plaintiff, by Its Bill, Is Entitled to Some Kind of Relief, the Motion Will Be Overruled Providing the Bill Contains a Prayer for General Relief.

Steward v. *Masterson,* 131 U. S. 158, 33 L. Ed. 116.

Edwards v. *Bay State Gas Co.* 91 Fed. 946.

Maeder v. *Buffalo Bills Wild West Co.* 132 Fed. 280.

Foster on Equity Prac., 6th Ed., Sec. 367.

Or to state it in another form, if any part of the relief prayed is proper, the motion will be overruled.

C. M. & St. P. Ry. v. *Hartshorn,* 30 Fed. 541.

Strawberry Hill v. *C. M. & St. P. Ry.* 41 Fed. 568.

(3) In Determining the Motion to Dismiss, the Bill and Exhibit "A" Attached Thereto, Are to Be Taken Together.

Continental Securities Co. v. *Interburrough Rapid Transit Co.* 165 Fed. 945.

(4) Under Equity Rule No. 29 a Bill Cannot Be Dismissed on Motion Without Answer Unless for "Misjoinder, Nonjoinder or Insufficiency of Fact to Constitute a Valid Cause of Action in Equity," Appearing on the Face of the Bill.

Tilden v. *Barber*, 227 Fed. 1010.

(5) The Rights of the Appellant Have Been Infringed.

The bill of complaint sets out that the appellant, a common law trust, was engaged in operating a lumber manufacturing enterprise, described on page 9 of transcript as follows:

> "The large mill (to which class both mills of the plaintiff belong) which cuts ten million feet and over annually."

That the small dishonest, speculative element in the lumber industry (Trans., 8) is highly dangerous and uses as one of its instrumentalities practices which have been widely condemned, what is known as the "Transit Car," that is a car shipped from a lumber manufacturing plant with no customer, in the hope that a customer may be obtained before it has arrived at the destination to which it is first consigned, which Transit Car also is an improper interference with the great volume of lumber business which flows naturally from the lumber manufacturer on the one hand (the appellant) to the retail dealer and the large industries on the other, which manufacturers on the one hand and retailers and large industries on the other, are obliged to make calculations, and are entitled to the ordinary and usual use of the equipment of the railroad, which use in times of car shortage is interfered with by the Transit Car (Trans., 9), as to which use the Commission says in its decision (Trans., 29):

> "When a shipment reaches the hold point and the

market is rising, the wholesaler has an incentive to hold the shipment awaiting further advance in price. On a falling market the consumer defers purchase." * * *

"Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation, the carriers are justified in taking steps to prevent such abuses."

The bill of complaint thus charges a direct interference with the business of the mills of the appellant by means of the "Transit Car."

(6) It Has Been Held That a Shipper Has a General Right to Maintain an Action to Set Aside Any Order of the Commission, Which Interferes With His Rights as a Shipper.

McLean Lumber Co. v. *United States,* ~~247~~ 237 Fed. ~~460~~.

~~*Merchants & Manufacturers' Traffic Ass'n. v. United States,* 231 Fed. 292, 294.~~

Interstate Commerce Commission v. *Diffenbaugh,* ~~242~~ 222 U. S. 42, 49, 56 L. Ed. 83, 88.

Not only does appellant set out a cause of action for injury to itself as a shipper, but as the owner of a railroad just being completed on April 17, 1922, and about to be operated as a common carrier of freight within the State of Mississippi. The injury which is done the railroads including that of appellant, is set out in the 5th, 6th and 8 paragraphs of the bill of complaint. The final paragraph of the Order of the Commission is (Trans., 39):

"And it is further ordered that this order shall continue in force until the further order of the Commission."

The preceding paragraph had directed all the railroads of the United States to cease and desist on and after March 13, 1922, from collecting the penalty charge of $10 per car per day on lumber and other forest products held for reconsignment beyond forty-eight hours after the hour at which free time begins to run under the demurrage rules. This order, as set out in the bill of complaint (Trans., 11) compelled a railroad company to refrain from the use of sufficient means to prevent its equipment being used for storage and warehouse purposes. The Commission in its decision (Trans., 25 to 27) has cited figures to prove that the result of the penalty charge had been to decrease the number of cars held idle at reconsignment points while loaded with lumber.

The bill of complaint sets up in the 7th paragraph (Trans., 11 and 12) that as to the locomotive, freight cars and other railroad equipment owned by the appellant to be used in connection with its railroad between Lumberton and Kiln, the Order of the Commission permits a person who comes into possession of any such equipment legally for the purpose of transportation, to retain it for another purpose (provided the appellant did not require such equipment for transportation) which order was in violation of the constitutional right of the appellant to the use of its own property, particularly in violation of the Fifth Amendment of the Constitution of the United States. It will be noted in connection with this that the final paragraph of the Order provided that it shall continue in force until the further order of the Commission. This in itself is a plain violation of the rights of the appellant as the owner of a railroad, because the Commission had held (Trans., 29):

> "We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful

> * * *. It is impossible to forecast the continuance of present conditions or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue that it is and will be unreasonable * * *. It should be clearly understood that any approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant."

The final clause of the order is in plain conflict with this finding of the Commission, and, therefore, has nothing to support it, and its insertion in the order is, under the finding of the Commission, an interference with the right of the appellant, as the owner of a railroad, to publish penalty charges in the future, if and when conditions warrant.

In other words, the Commission found that after then present conditions had ceased the carriers could reinstate the penalty charges and then, *in the face of that finding*, inserted a clause in its order, forbidding the carriers to initiate such a charge. The clause "And it is further ordered that this order shall continue in force until the further order of the Commission," is a clear case of an order with nothing to support it.

(7) The Bill of Complaint Should Not Have Been Dismissed Because of the First Ground of the Motion:

The ground is as follows:

> "1. The bill of complaint is vague, indefinite, uncertain, and insufficient, in this, to wit, the bill of complaint with Exhibit A attached thereto and made part thereof fails to disclose the nature of the 'Common law trust' of Edward Hines Yellow Pine Trustees; or the nature of 'the lumber manufactur-

> ing enterprise' operated by such common law trust; or the nature of the railroad which the common law trust is 'just completing' between Lumberton and Kiln, Mississippi, which the common law trust 'intends operating as a common carrier of freight by railroad'; or in what particulars it will, 'in certain matters,' become subject to the provisions of the various acts of Congress; by reason whereof plaintiff has failed to disclose any interest which entitles plaintiff to relief."

It is sufficient to say as to this ground, that the "common law trust" is a well known form of business organization. It was discussed, for instance, in the case of *Crocker* v. *Malley* 249 U. S. 223, 67 L. Ed. Page 174, in this court.

The nature of the "lumber manufacturing enterprise" was probably not necessary to describe, but it is described in the bill of complaint (Page 9 of Trans.) as "two mills, each of which cuts ten million feet and over annually."

As to the next phrase, the term "railroad" has a well understood meaning, and when the bill of complaint sets out, as it does, that the railroad extends between the cities of Lumberton and Kiln, Mississippi, its description was certain and definite. "General Certainty" is sufficient in pleadings in Equity, *City of St. Louis* v. *The Knapp Stout Co.* 104 U. S. 658, 26 L. Ed. 883.

As to the matters concerning which such a railroad would become subject to the provisions of the various acts of Congress, a reference to the acts cited in the first paragraph of the bill, on Page 3 of Trans., will disclose them.

In brief, this motion is more in the nature of a motion for a Bill of Particulars and one which probably ought not to have been granted even for that purpose.

(8) The Second Ground of the Motion of the Defendant, the United States, Is Not Justified by the Record.

The United States, as the second ground for its motion to dismiss states:

> "2. It does not appear from the bill of complaint and exhibit 'A' attached thereto and made part thereof that Edward Hines Yellow Pine Trustees, a common law trust, appeared before and complained to the Interstate Commerce Commission of the matters and things of which it now complains to the court."

This is a plenary suit in equity. The bill of complaint herein alleges in substance, that this order was beyond the power of the Commission and will irreparably injure plaintiff's property and business and we respectfully submit presents good ground for equitable relief.

It has been repeatedly held by this Court that such a suit may be maintained by a person who has not appeared as a complainant before the Interstate Commerce Commission of the matters and things of which it later complains to the court.

The leading cases of this kind are the ones which were heard together by the Supreme Court of the United States; the Peavy and the Diffenbaugh cases in which Justice Holmes, speaking for a unanimous court and affirming the decision of the three circuit judges of the 8th Circuit said:

> "The plaintiffs are affected by the order, and should have a chance to be heard, *although not parties before the Commission.*" (Italics ours)
>
> *Interstate Commerce Commission* v. *Diffenbaugh* ~~242~~ 222 U. S. 42, 49, 56 L. Ed. 83, 88.

In this same case (which was reported in 176 Fed. page 409) Mr. Justice Sanborn, speaking for the three

judges of the Circuit Court, amplified this subject and stated:

> "A careful search of the Interstate Commerce Act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul or suspend an order of the Commission to those who were parties to the proceeding upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Courts. The determination of the question; what parties may maintain such suit—is left by the Interstate Commerce Act to the general rules and practice in equity, and under them any party whose rights, of property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a Federal Court of Equity for relief * * *. The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this Court. The allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business, present good ground for equitable relief, and the demurrer of the Commission must be overruled."

It is a cardinal principle of law that

> "No complaint shall at any time be dismissed because of the absence of direct damage to complainant."

Reference to a few other cases in which counsel for the United States or Interstate Commerce Commission made a preliminary motion to dismiss the bill on the grounds that petitioners did not bring suit as common carriers or as shippers and that they had no interest in the orders of the Commission sought to be annulled and enjoined, as to enable them to maintain suit and in which the Courts dismissed their motion may be found in:

Merchants & Manufacturers Traffic Ass'n v. United States, 231 Fed. 292, 294 (1915); also *McLain Lumber Co.* v. *United States* 247 237 Fed. 460 (1916.)

In the latter case the petitioners were manufacturers of lumber, having mills at Chattanooga, and under the allegations of the petition, the Court said they were directly affected in the conduct of their business by the orders of the Commission. The Court said:

> "We cannot sustain the contention made by the Commission, in which the United States does not join, that merely because the orders made by the Commission do not directly affect the petitioners' own property or its use, and because they have no vested interest in any rates filed by a carrier with the Commission, they have no such pecuniary interest or property right involved under the orders in question as to give them a standing in court for the purpose of obtaining injunction relief."

The respect due to the repeated decisions of this Court forbids counsel for appellant from entering into any further extended discussion on this subject, suffice to say that we respectfully submit the lower court erred accordingly if it dismissed the bill of complaint on the above grounds.

(9) The Third Ground of the Motion of the Defendant, the United States, Is Not Justified by the Record.

The third ground of the motion to dismiss reads as follows:

> "3. The plaintiff seeks to raise an issue between alleged so-called speculators or crooked competitors and alleged so-called regularly organized and established wholesale and retail lumber dealers over alleged evil and fradulent practices in the manufacture and sale of lumber and not an issue between plaintiff and defendant over the power of the Interstate Commerce Commission to make and enter the report and order attached as Exhibit A and made part of the bill of complaint."

The bill of complaint discloses that the recital of the evils of speculators and wrong practices in the lumber

business, is for a legitimate purpose in a bill of complaint in equity. Such a bill of complaint is addressed to the conscience of the Chancellor. Certainly when his attention is called to the fact that the Transit Car, used by the "Speculator," a person without capital and without a permanent place of business or interest in the lumber industry, is used to disrupt the normal calculations of manufacturers, on the one hand, and the retailers and industrial customers on the other, as to the use of the limited amount of railroad equipment applicable to the lumber business, that if it is also brought to the attention of the Chancellor that the use of this Transit Car, makes more easy the commission and perpetuation of dishonest practices in the lumber business, the Chancellor is entitled to know such a fact and to give it weight.

It is hardly necessary to repeat the following doctrine, which is so familiar; a court of equity's modes of relief are not fixed and rigid, and having jurisdiction in the whole domain of conscience, limited only by legislative enactment, it can mold its remedies to meet conditions with which it has to deal.

Graselli Chemical Co. v. *Aetna Explosives Co.* 252 Fed. 456; 169 C. C. A. 380.

(10) The Fourth and Fifth Grounds of the Motion of the Defendant, the United States, Are Not Justified by the Record.

They appear on Pages 42 and 43 of Transcript.

These grounds, briefly, are that the bill is without equity and does not state any cause of action and that the order of the Interstate Commerce Commission was authorized by the Acts to Regulate Commerce and the

Transportation Act of 1920, and was regularly made and entered and it was not shown that in making it the Interstate Commerce Commission transcended its power. These grounds of the motion are fully answered in the various points in the brief of argument.

(11) Appellant Has a Recognized Standing as a Common Carrier Subject to the Interstate Commerce Act and as Such It Has a Further Interest, as a Transportation Matter, in Having the Commission's Order Set Aside.

In the first paragraph of the bill of complaint it is alleged that the plaintiff is—

> "* * * a common law trust, having its principal office in the city of Chicago, State of Illinois, has been for some years past and is now engaged in operating a lumber manufacturing enterprise in the Southern part of the State of Mississippi and is just completing a railroad between the cities of Lumberton and Kiln, Mississippi, which railroad the plaintiff intends operating as a common carrier of freight by railroad within the State of Mississippi, by virtue of which it will, in certain matters, become subject to the provisions of the various acts of Congress, known as an Act to Regulate Commerce."

In the 7th paragraph of the bill of complaint we allege:

> "That in connection with its railroad between Lumberton and Kiln, in the State of Mississippi, the plaintiff owns locomotives and freight cars and other railroad equipment which will be used upon said railroad, and that as to such equipment for any purpose not inconsistent with transportation, the plaintiff claims the right to the entire custody and control and use of such equipment for any purpose not inconsistent with transportation at a time when it is not required for transportation and that the principle of the order of the Interstate Com-

merce Commission of February 11, 1922, if carried to its logical conclusion will compel the plaintiff to permit any person who comes lawfully into possession of any of the equipment of the plaintiff for purposes of transportation to thereafter retain it for another purpose, provided the plaitiff did not require such equipment for transportation, which finding plaintiff alleges is in violation of its constitutional right to the use of its own property, and particularly in violation of the fifth amendment to the Constitution of the United States."

This 7th paragraph of the bill is merely illustrative. It carries a logical conclusion. The finding and the conclusion of the Commission are as follows:

> "There is now a large surplus of serviceable empty cars and generally speaking no congestion in the country", (Trans., 29).

and the conclusion being:

> "We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue it is and will be unreasonable." (Trans., 29.)

The Commission in its finance docket No. 2478 had before it the matter of the application of the Edward Hines Yellow Pine Trustees for a certificate of Public Convenience and Necessity, authorizing them to operate this line of railroad and on November 15th, 1922, the Commission stated:

> "Upon the facts presented we find that the present and future public convenience and necessity require and will require the operation by the applicants in interstate commerce of the line of railroad described in the application. A certificate to that effect will be issued accordingly."

This case is reported in Vol. 79 I. C. C., page 515 et sec.

The laws of Mississippi permitted appellant to construct this railroad which, when constructed and in op-

eration, was a common carrier and subject to all the obligations of a common carrier, to the general public. And, as stated, by Mr. Justice Day, in speaking for this court in the following case:

> "The right of the public to use the facilities of a railroad and to demand service of it, rather than the extent of its business, is the real criterion by which to determine whether or not it is a common carrier."

Tap Line Cases 234 U. S. 1, 58 L. Ed. 1185.

Further in this same case the court said:

> "But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty, in *Kaul Lumber Co.* v. *Central of Ga. R. R.*, 20 I. C. C. 450, 456 is no longer a mere appendage of a mill but a public institution.
>
> * * * where validity of the order of the Interstate Commerce Commission directing discontinuance of division of rates with another railroad depends upon whether or not that latter is a common carrier or plant facility *determination of that question upon undisputed facts, is a conclusion of law subject to judicial review.*" (Italics ours)

The courts have always taken judicial notice of the fact that a railroad is a common carrier where a statute declares it to be such and a declaration, and proof of such fact is unnecessary.

> *Caldwell* v. *Richmond & D. R. Co.* 87 Ga. 550, 15 S. E. 678.

The able counsel for the Commission in a memorandum brief which it submitted to the lower court, on page 7 states:

> "If any one is aggrieved by the order it would seem to be the carriers named in it. Can the plaintiff come before this court as the champion of the carriers named in the order? To permit it to do

so is contrary to principles frequently enunciated by the Supreme Court; for example in

Interstate Commerce Commission v. *C. R. I. & P.* 218 U. S. 88, 109."

Our answer to this is that we do not profess to be the "Champion of the carriers" named in the order (about 500 in number) but we allege in our bill of complaint that we, as a shipper and as a common carrier, are directly affected in the conduct of our business by this order of the Commission. Nor was it necessary for the 500 odd carriers named as defendant in the order of the Commission to intervene as parties complainant in this suit.

Under equity rule No. 38 (198 Fed. XXIX) it provides that

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

We also contend that the case cited by the counsel for the Commission (218 U. S. 88), which states in substance:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his is not in point."

In the next paragraph the court said:

> "But it may be said, such limitations upon the companies is *not of consequence* for shippers and trade centers are herewith complainants * * * We have said that the act to regulate commerce was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so whether persons or places be sufferers" (P. 110)—* * *. The Complainants are *common carriers* whose rates on certain traffic are directed to be reduced by the order complained of." (P. 111)

The railroads named as defendants in the Commis-

sions order unanimously favored the imposition of this $10.00 charge in controversy, and its continuance as a permanent transportation policy, in order to insure the prompt release of their equipment and they consistently protested against the appropriation of their property by these lumber speculators. However, when the Commission entered its order the defendant railroads were obliged to cancel the charge but such "acquiescence" and the fact that they have not intervened in the case at bar can have no legal significance.

The Federal Court has stated:

> "'Acquiescence' imports active consent * * * Consequently where a corporation consistently protests against the appropriation of its property acquiescence cannot be inferred."
>
> *Ocmulgee River Lumber Co.* v. *Ocmulgee Valley Lumber Co.* 251 Fed. 161.

We again respectfully submit that the bill of complaint herein is not vague, indefinite, uncertain and insufficient, but on the contrary that it fully and completely discloses the particulars in which the complainant "in certain matters" has an interest in the order of the Commission and that as the result of said order it causes irreparable injury to the plaintiff, as representative of a class of lumber shippers and railroads in this country, so numerous as to make it impracticable to bring them all before the court.

If the phrase "in certain matters" which is referred to in the motion to dismiss is sufficient for the purpose of this pleading, and under the act of October 22nd, 1913, the fact that the plaintiff is a living entity gives it the right to bring this suit in equity.

Justice Harlan, in speaking for this Court said:

> "A bill in Equity must contain a sufficiently certain, though general statement of the essential ulti-

mate facts upon which the complainant rests his claim for relief. It is not necessary to cover all the minute circumstances which may be proven in support of the general statement or charge in the bill.

General certainty is sufficient in pleadings in Equity." (Italics ours)

City of St. Louis v. *The Knapp Stout Co.* 104 U. S. 658, 26 L. Ed. 883.

(12) Statement With Reference to the Order of the Commission Which Is in Issue.

In order that the time of the Court may be conserved as much as possible we desire to make a short statement of the issues applicable to the order of the Commission which is here in issue. As a premise we will state that our complaint is not against the wholesaler of lumber as such; it is not against reconsignment; it is not even against the transit car, *per se;* nor does it seek to raise an issue with anyone else engaged in the lumber business. It arises simply and solely because the Commission's order of February 11th, 1922, permits and even justifies the abuse of the transit car privilege without let or hindrance, and the effect of its order is to cause a discrimination against the shipper using the method of direct shipment.

It is alleged in paragraph 6 of the bill of complaint that the Commission did not have power to make the order it did. In this connection we understand the law to be, that the findings of fact by the Interstate Commerce Commission are not reviewable by the court, providing the facts found support the order and that the findings are not contrary to the indisputable character of the evidence. In other words the Court cannot substitute its judgment for that of the Commission on administra-

tive questions of fact. On the other hand, we understand the law to be that an order of the Commission is plainly erroneous, as a matter of law, if their action is arbitrary or transcends the legitimate bounds of their authority, or if they give effect to an erroneous theory or if it is unsupported by the ascertained and undisputed facts or if the enforcement of it would cause unjust discrimination or favoritism.

We agree with every finding of fact ~~and of law~~ made by the commission in its report. Our complaint is directed to the conclusion drawn from the findings of fact and law. Our contention is that the Commission exceeded any authority or power it has when, after finding (a) that the $10.00 penalty was reasonable and lawful; (b) that it was a proper regulation by carriers in the interest of car efficiency, it then ordered the carriers to strike the charge from their tariffs, that this results in irreparable injury to complainant, as a shipper.

The Commission at the bottom of page 406 (Trans., 28) of its report states:

> "We are not concerned with the method by which complainant members conduct their business."

In other words, the Commission very properly holds that its function, pursuant to the act to regulate commerce, as amended, are only with respect to transportation considerations. But may the Commission make a lawful order, in any case, the inevitable consequences of which is to cause unjust discrimination between shippers which, under the law, are entitled to equal treatment, and can the Commission by its orders compel the railroads to lend its equipment to unfair competition? Paragraph 6 of the bill of complaint shows an illustration of the workings of the order of the commission in this respect, and later, in our brief, we will cite other

instances. It is indeed an unlawful abuse of their powers to exercise them so as to cause favoritism in service. We assume it to be the law that the Interstate Commerce Commission has no power to create, or perpetuate that thing which was the main cause of the passage of the law under which it exercises authority, to wit; unjust and undue discrimination.

Where the Interstate Commerce Commission forces, by its order, the carriers of this country to furnish free of charge, lumber yards from which lumber is sold in competition with those lumber dealers who assume the burdens of taxes and upkeep that ordinarily fall upon the American business man everywhere, we insist that it exceeded any authority reposed in it by the law of its creation. We refer to the report of the Commission for vindication of the fact of excessive car detention by dealers in transit lumber.

Nor can we expect relief from the Commission. It states that it is not concerned with the method by which the transit car users conduct their business. By its order the Commission has perpetuated business methods which cause irreparable injury. Where but before a court of equity may we go to secure those rights guaranteed by the law of the land?

In any Government regulation, the carriers control must be exercised with due regard to constitutionally guarantees for the protection of its property. The Commission by its order, in this case has perpetuated a condition that deprives this appellant of its property without due process of law.

This complainant was not a party to the case that was brought by the American Wholesale Lumber Association. It will not do for the Court to say "make your appeal to the commission." Before we could get action

in the matter the injury would be done, past recovery. It took more than two years to get the decision, the effects of which we here complain. The Commission found every fact to be as we know them; the Commission found the law to be as we understand it, and then for evident reasons of policy ordered the carriers to cease and desist to publish a charge the beneficial effects of which it found.

What we complain of is, as a practical matter the penalty charge designed to keep the cars moving when under load, cannot be established and cancelled as business rises or falls. Its cancellation by order of the Commission works irreparable injury of which we complain.

On Page 397 of its report, the Commission cites with approval, its own decision in *American Paper & Pulp Ass'n.* v. *B. & O. R. R. Co.*, 41 I. C. C. 506 at Page 512:

> "A rule which permits the shipper to use valuable facilities of the carriers for unlimited periods, while seeking to find markets for the goods or while waiting the convenience of the consumer, is not a proper rule and the practice, as complainant charges, is beyond the function of a common carrier. Such a practice may and often does, conflict with those functions."

In the Car Peddling Case, 45 I. C. C. 494, at Page 500, the Commission said:

> "We cannot, however, give our sanction to the view that the use of the car by a shipper as a place for vending its contents to the public is a service of transportation, or a right that the car load shipper may demand of the carrier either at common law or under the Act to Regulate Commerce.

In the face of two such clear legal pronouncements by the Commission itself have we not the right to appeal to a Court of Equity, constituted by law as the body to correct any mistakes of law the Commission may

make? If a shipper may not lawfully demand the use of carriers' cars from which to transact his business, may the Commission issue an order the effect of which is to require the carrier to give such use?

If the use of cars of carriers as lumber yards from which lumber is sold is not "transportation" within the meaning of the Act to Regulate Commerce, as stated by the Commission, where did the Commission secure authority to make its order? The Courts have held over and over again that the Commission is a creature of statutory law and has no authority to act outside the terms of the law of its creation. The Commission had no authority to issue an order the effect of which was to force the carriers to do that which the Commission could not directly compel them to do. Suppose the Commission should order the carriers of the country to furnish their cars for places from which traders in general might transact business. Of course, the carriers would resist such an order and this Court would sustain them. The principle is precisely the same in the order of which complaint is made.

This order of the Commission should be enjoined because it lays upon the commerce of the country an artificial ban that Congress never intended should be put forth, and is, therefore, outside the power conferred on the Commission by the Constitution of the United States, and the statutes.

(13) The Order of the Commission Is to Be Read in Connection With the Report of Which It Forms a Part.

This is the language of Justice Lamar in speaking for this court in the case of *A. T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 220.

For the convenience of the court the report and find-

ings of the Commission may be briefly summarized as follows:

1st. That the Director General had the right to inaugurate any reasonable and just regulation and practice which he might find necessary to eliminate the abuse or excessive and unreasonable detention of freight cars. (Page 396, Trans., 18.)

2nd. That the carriers had the right to continue it.

3rd. A charge in the nature of a penalty is not unlawful, if its purpose is to secure for the public a more efficient use of equipment. (Page 397, Trans., 19.)

4th. That the $10 charge is not a double charge for a single service. (Page 397, Trans., 19.)

5th. That the charge was not unreasonable. (Page 398, Trans., 20.)

6th. That there was no discrimination against lumber in this $10 charge. (Page 400, Trans., 22.)

7th. That the imposition of the $10 charge materially reduced the time which cars were being held at reconsignment points. (See table on page 403, Trans., 25.)

8th. That it is much more difficult to hold reconsigned cars on the active tracks of railroads than direct shipment cars on other tracks. (Page 405, Trans., 27.)

9th. That to hold cars in yards also congests the terminals and interferes with the prompt handling of other freight, and states that defendants urge the only effective means of dealing with detention at reconsignment points is by applying a penalty charge. (Page 405, Trans., 27.)

10th. That a railroad's function is to move traffic. (Page 407, Trans., 29.)

11th. That the furnishing of storage is not a primary railroad function. (Page 407, Trans., 29.)

12th. That the free time provided for loading and unloading, and reconsignment, has been fixed as a reasonable time within which cars should be released and made available for further movement. (Page 407, Trans., 29.)

13th. That the shipper has no inherent right to retain a car beyond the free time and thus preventing it from being used for transportation by other shippers. (Page 407, Trans., 29.)

14th. When it appears that shippers detain cars for purposes other than those necessary for proper transportation, the carriers are justified in taking steps to prevent such abuses. (Page 407, Trans., 29.)

The above 14 findings are in direct conflict with the finding and conclusion of the Commission based on it, to wit:

> "There is now a large surplus of serviceable empty cars and generally speaking, no congestion in the country."

and their conclusion:

> "We are of the view that there is no justification for the charge at the present time and we find that while present conditions continue, it is and will be unreasonable." (Page 407, Trans., 29.)

We find the fact that

> "THERE IS NOW A LARGE NUMBER OF SERVICEABLE EMPTY CARS AND, GENERALLY SPEAKING, NO CONGESTION IN THE COUNTRY."

is the only finding of fact in the whole decision which is in reference to the conclusion just quoted. Paraphrased, the finding and conclusion are:

> "THERE ARE IDLE CARS IN THE COUNTRY, THEREFORE, ANYONE WHO LAWFULLY ACQUIRED THEM FOR TRANSPORTATION CAN USE THEM FOR STORAGE PURPOSES INDEFINITELY."

We respectfully submit that the conclusion in that sen-

tence does not follow from the statement of fact. No more does the conclusion in the opinion follow from the statement of fact there, and to illustrate its fallacy; it is set out in the 7th paragraph of the bill of complaint that the principle of the order of the Interstate Commerce Commission of February 11, 1922, if carried to its logical conclusion will compel plaintiff to permit any person who comes lawfully into possession of any of the equipment of the plaintiff, for purposes of transportation, to thereafter retain it for another purpose, provided the plaintiff did not require such equipment for transportation.

By keeping in mind that the order of the Commission is to be read in connection with its report of which it forms a part, when so read, in conjunction with the Act to Regulate Commerce, as amended, combined with the many former rulings of the Commission together with the decisions of the federal and other courts which we will hereinafter cite, that the fact will be apparent that its order is arbitrary and wholly transcends the legitimate bounds of its authority.

(14) The Appellant on This Appeal Relies Upon the Findings of Fact of the Commission in Its Decision of February 11, 1922, in No. 11818, Made Exhibit "A" of the Bill of Complaint.

The appellant understands the law to be, that unless the whole record is brought up on appeal and it can be shown from all the evidence that the findings of the Commission are either contrary to or unsupported by evidence, that this court will assume the findings of fact of the Commission to be supported by evidence.

In this particular case, the contention of the appellant is sustained throughout by the findings of fact of the

Commission, which findings are not attacked by the appellant, but the appellant attacks the *conclusion* of the Commission contained in the following language:

> "We are of the view that there is no justification for the charge at the present time, and we find that while present conditions continue, it is and will be unreasonable." (Page 29 of Transcript.)

upon the ground that such conclusion is not a proper conclusion to be drawn from the facts theretofore found by the Commission, and also attacks the final clause of the order,

> "And it is further ordered that this order shall continue in force until the further order of the Commission." (Page 39 of Transcript.)

is not only not sustained by the finding of the Commission, but in conflict with the following finding:

> "It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future, if and when conditions warrant." (Page 29 of Transcript.)

The Commission itself states (page 16 of Transcript):

> "By agreement between the parties the evidence was directed solely to the lawfulness of the charge."

Therefore, there was no evidence on which to base any finding as to present conditions, as the sole question litigated was "the lawfulness of the charge," and that question having been decided in favor of the defendants, the Commission's findings and order should have been for the defendants, leaving the complainant to another proceeding if they desired to test the question as to whether the charge was reasonable under *then* existing conditions. It will be seen that this finding of the Commission, based upon no evidence whatever, either pro or con, deprived the defendants both of their right to cross-

examine the witnesses of the complainant, if that question had been involved, and also of their right to submit evidence as to what then present conditions were. What the Commission did was to issue an administrative fiat on an abstract or moot question, which was not the actual subject of the controversy and upon which there was no evidence before it. The Commission, as a *quasi* judicial body, has no authority to issue an order not based on evidence.

Interstate Commerce Commission v. *L. & N. R. R.* 227 U. S. 88; 57 L. Ed. 431.

Interstate Commerce Commission v. *Union Pac. R. R.* 222 U. S. 541; 56 L. Ed. 308, 311.

Florida E. Coast R. R. v. *United States*, 234 U. S. 167; 58 L. Ed. 1267.

(15) The Carriers Have the Right Under the Statute to Initiate Tariffs in This Case, the Final Clause of the Commissioner's Order Is One Which It Had No Jurisdiction to Make.

The Commission has power to initiate rates, but only incidentally in connection with determining a railroad's fair rate of return on its investment. (See Sec. 15a, par. 2 of the Act.) Such subject was not involved in this proceeding before the Commission.

Nor does the authority given to the Commission by Subdivision 15 of Section One of the act in cases of emergency.

> "To suspend the operation of any or all rules, regulations or practices then established with respect to car service,"

extend to the suspension of a positive and definite enactment of the statute covering the subject.

B. & O. R. R. Co. v. *Lambert Run Coal Co.* 267 Fed. 776, 779.

Railroads subject to the Act have never been deprived of their power to initiate rates and such power to make rates, includes the power to make charges and regulations incident to the rates. Under the Act, if a common carrier initiates a rate, charge or regulation, which the Commission deems improper, the Commission has the power to suspend such a rate, charge, regulation, etc., and "To enter upon a hearing concerning the *lawfulness*" of the same and if required, cancel it. (Interstate Commerce Act, Sec. 15, par. 7.) There are undoubtedly many cases in which the Commission would have the right to make an order that a charge, which it investigated and canceled, could never be imposed by a railroad because it, in fact, caused unjust discrimination or was otherwise inherently improper, but when the Commission finds, as it does here, that this decision

> "Is not to be construed as a inhibition on the carriers to publish penalty charges in the future if and when conditions warrant,"

thus admitting that the penalty charge is proper under such conditions, and then enters an order

> "and it is further ordered that this order shall continue in force until the further order of the Commission,"

it takes away from the carrier the power of initiating rates. The Commission has thereby extended its powers beyond a positive and definite enactment of the statute. There is no provision in the law which permits the Commission to issue an order which decides a moot question. The procedure as to rates and charges, when initiated by the carrier, is very plain. It is contained in Section 15, par. 7, and is too well known to this court to require extended citation.

By the clause of the order complained of, the Commission has deprived the carriers, including the carrier,

whose operation was about to be commenced in April, 1922, of their legal right to initiate the penalty charges which the Commission had found to be proper

"if and when conditions warrant."

In other words, that law never deprived the carrier of its common law right to judge in the first instance

"if and when conditions warrant"

but the Commission has done so by this final clause. Without such final clause in the order, the carriers had remaining a fairly good remedy. The moment that a car shortage arrived, they could have put the penalty charge in effect, and if any objection or protest had been made, the Commission would then have the legal right to pass upon the tariff containing such penalty. By depriving the carrier of the right to initiate a tariff containing the penalty charge the Commission has made it impossible for the penalty charge ever again to be imposed.

As we have stated, the power of the Commission to initiate rates is found in paragraph 2 of Sec. 15 "A" of the Interstate Commerce Act. It is a limited power. It is given for the purpose of aiding on the one hand carriers to earn an adequate return and on the other hand to prevent them from earning exhoribtant returns. The initiation of a charge, the chief purpose of which is not revenue but to prevent misuse of equipment, could not be sustained under this power.

(16) The Order of the Commission Creates Unjust Discrimination.

As was stated by Mr. Justice McKenna, in speaking for this court:

> "The Commission was instituted to prevent discrimination between persons and places. It would

indeed be an abuse of its powers to exercise them so as to cause either."

Interstate Commerce Commission v. *C. R. I. & P. Ry.* 218 U. S. 88, 103; 54 L. Ed. 946, 954.

A few illustrations should suffice to demonstrate how the order of the Commission, in its application, actually creates unjust discrimination against the shipper using the direct method of shipment as compared with the shipper of lumber who uses the cars and tracks of the carrier at the reconsigning point for storage and vending purposes. The Commission in its report, on page 407 (Trans., 29), uses the following words:

"The small mill is constantly tempted to put cars on the rails to secure an advance from the wholesaler, even though trade conditions are such that there is no possibility of disposing of the lumber within a reasonable time after the cars reach the hold point. When the shipment reaches the hold point, and the market is rising, the wholesaler has an incentive to hold the shipment awaiting further advance in price. On a falling market the consumer defers purchase."

This paragraph is directly related to the point that the order of the Commission creates an unjust discrimination. Such discrimination is very obvious. All shippers, whether of transit cars or of direct shipments, have the right before the car reaches a reconsignment point to reconsign the car at the reconsignment rate and a payment of three dollars additional charge. Thus up to the reconsignment point all are treated alike. Beyond the reconsignment point the discrimination in favor of the transit car commences. He has the right to have his car held on the active tracks of the railroad for twenty-four hours without any payment. He has the right to reconsign his car at any time within twenty-four hours and get the advantage of the through rate to the recon-

signment destination. The abuse of the transit car commences at the expiration of the twenty-four hour period when the shipper who has no yard who has put his cars on the rails without a customer, a highly speculative proceeding—asserts his right to have his car held indefinitely upon the active tracks of the railroad without payment for turning the rails and cars of the railroad into a rolling and perambulating lumber yard. No competitor in the lumber business has this right, because it is idle to say, that the entire lumber business of the United States, counting in the month of September, 1920, 108,898 cars (Trans., 26), could all be put on the rails without purchasers, all go to demurrage at reconsignment points at the end of twenty-four hours and all insist on having their lumber held in these 108,898 cars until a purchaser was found. As the Supreme Court of the United States has said, the mere statement of a rule which is in form available to everyone, but which it is evident cannot be availed of except by a few, is not an extension of a similar privilege to all alike.

Another familiar holding of this court is:

> "A ruling apparently fair on its face and reasonable in its terms, may in fact, be unfair and unreasonable, if it operates so as to give one an advantage of which another similarly situated cannot avail himself."
>
> *Union Pacific R. R.* v. *Updike Grain Co.* 222 U. S. 48. 2 1/2

And the Commission in its report, on page 405 (Trans., 27), said:

> "It is much more difficult to hold reconsigned cars than cars which have been placed for delivery, since cars held in yards for reconsignment must be switched over and over again to get out other cars on which forwarding orders have been received."

Another illustration of unjust discrimination as a result of the Commission's order is referred to in paragraph 6 of the Bill of Complaint where it is alleged:

> "* * * That the said Interstate Commerce Commission by its said order also compels the railroad company to lend its equipment to unfair competition in the following manner: There is on all cars not immediately accepted by their consignees a demurrage charge, but in the instance of wholesale lumbermen, such as the corporation of which the trustees of the plantiff are directors, it pays the demurrage charge with the car shifted from the tracks of the railroad company and on the company's unloading track; that in the case of consignees who do not have unloading tracks of their own, the car is taken from what are known as 'holding tracks' of the railroad, which are the active tracks, and placed upon a sidetrack known as the 'public track,' or 'team track,' and in both instances after they are so placed the car requires no further effort or attention from the railroad company until it is unloaded; but that in the case of a speculator's car, such car is kept on what are known as 'holding tracks' which are active tracks of the railroad company, and is shifted in the yards daily in the making up of trains, and is kept in a position where if an order comes to a wholesaler such as the corporation, of which the trustees of the plaintiff are directors, or a retailer whose cars is on the public track, and the same order comes to a speculator all on the same day, the speculator can promise, because his car is on the active tracks of the railroad, quicker delivery than either the wholesaler or the retailer by an average of 48 hours, but the demurrage charge which the wholesaler, the retailer, and the speculator pays is the same in all three instances." (Trans., 11.)

The fact that the "speculator" is able to derive a further undue advantage over competitors through the service of the carriers and this order of the Commission is further evidenced by the statement of the Com-

mission itself when it recognizes that these speculators may use the carriers equipment and their facilities for storage purposes at the reconsignment point *awaiting a favorable market.* To quote from an opinion of the Commission:

> "* * * When a shipment reaches a hold point not sold and the market is rising the dealer has an incentive to hold his shipment awaiting a further advance in price. On a falling market, on the other hand, the consumer defers his purchase. *In either case the car is detained, the terminal congested and other shippers deprived of the use of the carriers' equipment and other facilities. Delays arising from such causes are to be unqualifiedly condemned.*" (Italics ours.)
>
> *Reconsignment Case,* 47 Interstate Commerce Commission, 590, 633.

There is no need to repeat paragraph three of the Bill of Complaint here. (Trans., 4.) It gives many other illustrations of how certain dishonest, unscrupulous Speculators in lumber operate; not only in holding the cars of carriers awaiting favorable markets; not only in using the equipment and facilities of the carrier for storage and warehouse purposes; not only in congesting carriers' terminals and thus preventing the freedom of commerce and the use of the carriers' equipment by the shipping public, but this paragraph No. 3 of the Bill shows that these dishonest speculators in the lumber industry frequently manipulate the footage and change the grades of lumber to their profit and to the prejudice of other, reputable, concerns, in this line of business. Such dishonest activities, however, we state in our bill, are confined to a comparatively small number of individuals and firms. However, they are apropos to the alleged abuse of this reconsignment privilege and demonstrate that it

is the entire public which must suffer by such methods, as in the final analysis, it is the consumer who pays the freight.

The Commission specifically found in this case in controversy, that transportation, reconsignment, demurrage and the use by the speculative element were separate services, each one of which ought to be paid for separately and that demurrage did not cover the service for which this $10 charge was imposed. Therefore, the conclusion is that every time an owner of lumber on a transit car (now that this penalty charge has been canceled), obtains the use of the car for storage and sale, he obtains this service indefinitely and for nothing.

The Commission in a comparatively recent case, in passing upon the reasonableness of a storage in transit charge of 3c per hundredweight on potatoes said:

> "The use of the car, either into or out of the storage point, is wholly independent of the subsequent or prior movement, as the case may be. *For each separate use of a car the carrier is entitled under the tariff to make a separate charge.*" (Italics ours.)
>
> *Northern Potato Traffic Ass'n.* v. *Gr. Nor. Ry. Co.* 58 I. C. C. 360.

No proof is necessary to evidence the fact that such use by the speculative element, for which this $10 charge was imposed, entails additional expense and disadvantages to the carrier. In fact, the Commission has said:

> "Storage in transit entails additional expense and disadvantages, which do not attach to through shipments, including switching, detention of inbound equipment, absorption of outbound switching charges in certain cases and expense of accounting and readjusting revenues, while the carriers render substantially the same service as on local traffic both inbound and outbound."
>
> *Nothern Potatoe Traffic Ass'n* v. *Gr. Nor. Ry. Co. supra.*

And the Commission has also said:

> "The underlying principle is that such charges (penalty charges) are imposed, not primarily to produce revenue, but to accomplish a specific purpose, such as the prompt removal of freight from the carriers' premises. If the purpose is reasonable and the charges are no higher than necessary to accomplish it the charges are reasonable."
>
> *Kidson & Co.* v. *D. L. & W. R. Co.* 74 I. C. C. 135, 139.
>
> *Dodge Bros.* v. *Director General,* 62 I. C. C. 689.
>
> *Huffman Bros. Motor Co.* v. *N. Y. C. R. R.* 74 I. C. C. 671, 672.

And as we have stated, the Commission in this case in controversy has held that this $10 charge was not unreasonable. (page 20 of Transcript.)

In *Seaboard Air Line R. Co.* v. *New Orleans Export R. Co.* 271 Fed. 861, the court held that where facilities are furnished a shipper they should be paid for otherwise.

> "The shipper enjoying the free use of the cars would have received a marked advantage over the one charged for storage in a warehouse."

The great and primary purpose of the Act to Regulate Commerce was to prevent unjust discrimination and unreasonable preferences and to destroy favoritism. The Transportation Act of 1920 sought to insure adequate transportation service and to "Best promote the service in the interest of the public and the commerce of the people."

We, of course, do not question the power of the Commission to pass on questions involving unjust discrimination by carriers subject to the Act; in fact, as we have stated, the Commission in this case in controversy, held that there was no discrimination against lumber in this

$10 charge. (Page 22 of Transcript.) Such holding was clearly within the Commission's administrative powers. But we do challenge the power of the Commission to issue an order when the application and effect of its order, *ipso facto,* causes unjust discrimination and unreasonable preference. The fact, that the Commission by its order, in effect, authorizes these lumber speculators to obtain the use of the carriers' equipment and other valuable facilities, indefinitely and free of charge, for the purpose of storage and sale, and which the Commission by its order in effect, states, "because there are idle cars speculators can use them indefinitely for storage purposes and sale, free of charge," comes clearly within the principle of unjust discrimination, which the Commission itself has frequently condemned, when a carriers' practice is before it, of granting the use of its properties and facilities to certain shippers free, or for a nominal charge. The Commission in passing on such questions has often said that *its duty is to look at the real substance of the transaction and not the form.*

Interstate Commerce Commission v. *B. & O. R. R.* 225 U. S. ~~85~~ 326

For illustration in a case recently decided by the Commission, it said:

> "When a carrier permits a shipper to use valuable lands to which the carrier has title, without charge or without reasonably adequate charge, the practical affect is to reduce that shippers transportation charges, so that there results, what amounts to a refunding or remission of some portion of the published rates, and results in unjust discrimination."

Leases & Grants by Carriers to Shippers, 73 I. C. C. 671, 672.

Can it be said that the practice of the carriers, which the Commission condemned in that case, is not analogous to the principle of unjust discrimination, condemned by the Act and which the Commission in this case in controversy, by its order now sanctions, merely because "there are idle cars in the country and no present emergency"?

The only distinction between the above case and the issue here in controversy, is that when the Act of the railroad causes unjust discrimination it is a matter within the administrative powers of the Commission to pass on, *but if the effect of the Commission's order is to cause unjust discrimination and unreasonable preferences, then it is the clear duty of this court to hold such order invalid.*

(17) The Order of the Commission Is Not in the Public Interest so as to Keep the Railroad in Effective Operation.

As Mr. Justice Brandeis, recently said, in speaking for this court:

> "An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized."
>
> *Akron C. & Y. R. Co.* v. *United States*, ... (Decided Feb. 9, 1923), 67 L. Ed. 308.

Prior to the Transportation Act of February 28, 1920 (41 Stat. at L. 456; Fed. Stat. Anno. Supp. 1920, p. 109), the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates. The Transportation Act of 1920 introduced into the federal legislation a new railroad policy and sought to insure also adequate trans-

portation service. That such was its purpose it did not leave to inference. The new purpose was expressed in unequivocal language. Thus:

To enable the carriers "properly to meet the transportation needs of the public" (Sec. 442, p. 491); to give due consideration to "the transportation needs of the country * * * and the necessity * * * of enlarging (transportation) facilities" (Sec. 422, p. 488); to "best meet the emergency and serve the public interest" (Sec. 402, p. 477); to "best promote the service in the interest of the public and the commerce of the people." (Sec. 402, pp. 476, 477); "that the public interest will be promoted." (Sec. 407, p. 482.)

Can it be said that the Commission's order is

> "To best promote the service in the interest of the public and the commerce of the people."

when the Commission by its order, in effect, states:

> "There are now idle cars in the country and anyone can use them for storage purposes indefinitely?"

We respectfully submit that such order is

"made to accomplish a purpose not authorized." by the Act to Regulate Commerce as amended. Nor is the order of the Commission in the case at bar consistent with its holding in many of its former decisions to the effect that:

> *"Carriers are justified in establishing car service rules which will insure the prompt release of equipment.*
>
> *That an obligation rests upon a carrier so as to conduct its business that all of its patrons shall be accorded the fullest and freest use of its equipment.*
>
> *A carrier, however, is under duties other than those which it owes to the particular shipper. It owes a duty to the community which cannot be efficiently and promptly performed if its cars and ter-*

minal facilities are cluttered with uncalled for freight.

The railroad directly, and indirectly the public, are benefited by a speedy release of cars and their speedy return into circulation. This obvious fact is emphasized by the conditions which now exist throughout the United States.

*If once a terminal contains more traffic than it can promptly handle and deliver, it acts as a dam which floods a constantly increasing area behind it. One of the causes of such congestion at terminals is the reconsignment privilege * * *. Cars are constantly used by shippers as warehouses.*

Some way should certainly be devised by which the shipper is prevented from withdrawing cars from the service of transportation since otherwise the entire public must suffer.

If necessary a penalty, in addition, is in the public interest.

Carriers are not obliged to provide storage in cars but if they do so they are entitled to reasonable compensation.

The consignee has no legal right to use a car as a warehouse and no right to a car or track as a trading place to the embarrassment of the carrier.

The use of a car by a shipper as a place for vending its contents to the public is not a service of transportation.

The Commission has always regarded reconsignment as a privilege and not a right to be demanded by shippers.

In no case has the Commission condemned reconsignment as a service. The abuse and not the reasonable use of the practice has been the subject of criticism.

There is an ever-present temptation before the shipper, however, to convert the reconsignment privilege into a means of indefinite storage.

A penalty tends to become more effective as it is made more severe."

These recognized principles enunciated by the Com-

mission appear in the following cited cases, which we will briefly quote from for the convenience of the court:

In *Pittsburg and Ohio Mining Company et al.* v. *B. & O.* 40 I. C. C. 409, it was stated:

> "We have expressed the view that the carriers are jutsified in establishing car service rules which will insure the prompt release of equipment. • • •
>
> The carriers are not obliged to provide storage in cars, but if they do so they are entitled to reasonable compensation for the service; that consignee has no legal right to use a car as a warehouse; that the business of a railroad is transportation not storage, that it is to the interest of both carriers and shippers that cars be promptly released; and that an obligation rests upon carrier so to conduct its business that all of its patrons shall be accorded the fullest and freest use of its equipment."

Again, the Commission held in *Coal From Arkansas and Other States,* 49 I. C. C. 727:

> "At no time should there be a wasteful or extravagant use of equipment, and where that occurs, through the responsibility of the shipper, a fitting penalty might justly be imposed to prevent it."

Also:

> "The carrier has met its obligation under the law when it has equipped itself with sufficient cars to meet the requirements of its shippers. If shippers elect to so conduct their business as to defeat the successful and economical allotment and interchange of equipment it is not unreasonable for the carrier to restrict the reconsignment privilege in order to protect its interests."
>
> *C. & N. W. Ry. Reconsignment Rules,* 29 I. C. C. 620, 623.

In fact the Commission has sanctioned the imposition of charges upon an ascending scale, providing it will expedite the movement of freight the Commission said:

> "This Commission has repeatedly said that it was not part of the duty of the common carrier by

rail to furnish warehouses for the storage of articles transported even though the convenience of its patrons might so require. We have consistently held that carriers might impose such charges as would compel the removal of freight from their depots and freight sheds. We have in several cases sanctioned the imposition of charges like these upon an ascending scale."

New Orleans Storage Rules, 28 I. C. C. 605.

In *Detroit Traffic Association* v. *L. S. & M. S. Ry. Co.* 21 I. C. C. 257, 261, it is said:

"There is an ever-present temptation before the shipper, however, to convert the reconsignment privilege into a means of indefinite storage. So long as the demurrage fees are paid, the consignee regards it as his right to delay reconsignment so long as he pleases. The privilege of reconsignment properly carries no such right."

In *Wilson Produce Co.* v. *Penn. R. R. Co.* 14 I. C. C. 170, 175, the Commission said:

"There is no legal right in a consignee of freight to use a car as a warehouse, and no right to a car or track as a trading place to the embarrassment of the carrier. The carrier has the right to do what it has done—provided in its multiplicity of functions it has not as a carrier effected discrimination against shippers or localities by imposing charges which will free its market place."

In *re*: *Advances in Demurrage Charges on Interstate Traffic* the Commission held:

"The railroad is able to serve the public only when its cars are used for moving freight, and can satisfactorily and properly serve the public only when its tracks are available for reasonable prompt delivery of freight. 'If a coal mine cannot get cars to fill its order, it is more than probable that thousands of cars loaded with coal are held in various distributing centers awaiting favorable markets.' These illustrations are not hypothetical they are drawn from every day experiences and clearly

demonstrate the harm that may be done the public through the undue detention of cars. Many commodities are forwarded steadily from points of production when final destinations are not known and are distributed to various destinations under reconsignment privileges. In some instances these privileges have been carried to such an extent as to form a real abuse. Some way certainly should be devised by which the shipper is prevented from withdrawing cars from the service of transportation since otherwise the entire public must suffer. 25 I. C. C. 314."

In *The Car Peddling Case* (45 Interstate Commerce Commission, 494, 500), the Commission said:

"We cannot, however, give our sanction to the view that the use of a car by a shipper as a place for vending its contents to the public is a service of transportation, or a right that the carload shipper may demand of the carrier either at common law or under the Act to Regulate Commerce."

In *Reconsignment Case,* 47 I. C. C. 590, 624, in speaking of the evils of car detention held for reconsignment, the Commission further said:

"The possibility of such results of the carriers present practices supports the belief that adequate compensation for the full period of detention awaiting orders, and if necessary, a penalty in addition, are in the public interest."

In *Wilson Produce Co.* v. *Penn. R. R. Co.* 14 I. C. C. 170, 175, the Commission said:

"The value of the service rendered or the cost of the service is not conclusive of the reasonableness of the schedule; it must be judged in the light of its general purpose. The railroad does not hold itself out as a warehouseman with respect to its cars and tracks."

"The congestion of traffic arises not at points of origin but either at points of destination or at the terminals where freight is transferred from one line

to another. This congestion has its effect upon all lines of railroad reaching such terminals. If once a terminal contains more traffic than it can promptly handle and deliver, it acts as a dam which floods a constantly increasing area behind it. One of the causes of such congestion at terminals is reconsignment privileges granted on many of the principal articles of freight * * *. *Cars are constantly used by shippers as warehouses* and the time allowed to shippers for loading and unloading is in excess of real necessity and to some extent is responsible for the congestion at terminals and the consequent car shortage at points on the line * * *. It was agreed by the shippers as well as the railroads that these privileges should be curtailed." (Italics ours.)

Re: Car Shortage Case, 12 I. C. C. 561, 570 and 579.

"The Commission has always regarded reconsignment as a privilege and not a right to be demanded by shippers and has consistently refused to extend same except to correct unjust discrimination."

C. & C. Co. et al. v. *C. S. Ry. Co. et al.* 16 I. C. C. 387.

"The stoppage of a commodity in transit for the purpose of reconsignment is in the nature of a special privilege which the carrier may cancel, but which the shipper cannot demand as a matter of lawful right."

St. Louis Hay & Grain Co. v. *M. & O. R. R. et al.* 11 I. C. C. 90.

We also agree with the Commission when it states:

"In no case has the Commission condemned reconsignment as a service. The abuse and not the reasonable use of the practice has been the subject of criticism."

Doran v. *Nashville C. & St. L. Ry. Co.* 33 I. C. C. 526, 529.

And again in *C. N. Dietz Lumber Co.* v. *Atchison, Topeka & Santa Fe Ry.* 22 I. C. C. 75, they state:

> "We do not find that the limitation of the reconsignment privilege under the through rate to first 48 hours after the arrival of a car at destination is unreasonable; in fact we recognize the need of such a limitation to prevent the use of cars for storage purposes, one of the abuses incident to an allowance of the reconsignment privilege."

In the case of the *Rockford Fuel and Lumber Company et al.* Docket No. 10, Tentative Report, it was held:

> "A charge which is assessed as a penalty is not for that reason unlawful if its purpose and effect is to secure a public benefit such as the more expeditious movement of equipment or release of cars."

In the case of *New York Storage,* 47 I. C. C. 141, the Commission held:

> "It must be remembered, however, that the rules and charges now under consideration are proposed because the others failed on the principle that a penalty tends to become more effective as it is made more severe."

The principles declared in those cases are salutary and there has been no disposition of the courts to depart from the same. Such citations disclose in succinct form, that there was and now is "justification" for this penalty charge as a permanent transportation policy. We submit that the Commission by its order accomplished a purpose not authorized when they said "there is no justification for the charge at the present time" (page 29 of Transcript) and that its order is not in the public interest to keep the railroad in effective operation.

The spirit and letter of the Act to Regulate Commerce requires that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all affected as well the carriers as the traders

and consumers of the country. This was a material issue in the case tried by the Commission which it is not at liberty to disregard.

Farmers Loan & Trust Co. v. *Northern Pac. Ry.* 83 Fed. 249, 252.

Interstate Commerce Commission v. *L. & N. R. R.* 73 Fed. 409, 419, 420.

Furthermore, it is evident from a review of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce. This is particularly evidenced by Title III, of the Transportation Act, which the Supreme Court of the United States recently construed in *Penn. R. R.* v. *Labor Board*, 261 U. S. 72.

Mr. Chief Justice Taft, speaking for this court, said (page 79):

> "The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of interstate commerce and the actuated inconvenience to which all must be subjected by an interruption caused by a serious and wide-spread labor dispute fastens public attention closely on all the circumstances of the controversy and arouses public criticism to the side thought to be at fault."

It cannot be too often stated that the function of a railroad is to furnish transportation and not storage; that cars of common carriers are transportation agencies to be used to move freight and may not be used as store houses from which to sell the contents. Railroads are the arteries of commerce and as stated, should not, by the Commission's order, be restricted from carrying out their obligation to the public—to transport freight and not to store it. Such basic fact holds true whether there is a surplus or a shortage of cars, whether cars are plentiful or few.

The Commission, in its report, recognizes that in the past, car shortages have followed quickly upon periods of car surplus. That car shortages have resulted in incalculable loss in the past both to the carriers and to the shipping public as a whole; that when shippers detain cars for purposes other than those necessary for proper transportation, the carriers are justified in taking steps to prevent such abuses.

Can it be said that the Commission kept in view "the general public good" or "the welfare and advantage of the great body of citizens of the United States who constitute the producers, shippers and consumers" when it said in its report: "There is no justifications for the charge at the present time." We submit the order of the Commission is indefinite and not in aid of interstate commerce because it does not tend to a more prompt release of the carriers equipment.

The issue in this case is not one which involves the "wisdom or expediency" of the Commission's order, which this court has frequently stated is not a matter which is subject to judicial review. But a material issue in this case does involve a question of general and statutory law, as to a carrier's function and duties, and also the thought and purpose of Congress which, repeatedly recognizes in its regulatory laws "the economic interest of every member of the public in the undisturbed flow of interstate commerce."

(18) The Evils of the Transit Car Are Recognized by the United States Bureau of Forestry.

In February, 1920, the Senate of the United States requested the Forest Service to make an investigation into the cause of the high lumber prices that ranged at that time. On June 1, 1920, the Chief Forester made his

report to the United States Senate, on Senate resolution 311; 66th Congress and which report is now a public document. On pages 55 and 56 of this report we find the following:

"Opportunities for speculation in lumber prices by both producers and distributors tend to increase as the distance between forest and market becomes greater and as a species of lumber becomes scarcer. During the 8 or 10 months preceding March, 1920, much speculation entered the trade in markets far removed from the producing regions. The common use of the reconsignment privilege, for example, by which cars of lumber are shipped prior to sale, the shipper or wholesaler, as the case may be, relying upon favorable sale while the lumber is in transit or when it reaches a consignment point, was a fruitful source of speculation. These cars were often held for bid prices and served to intensify the auction market and to lift prices.

During the past year demurrage charges on transit cars amounting to $100 and $200 per car were not uncommon. The records of transit cars at the Minnesota transfer alone show that during the period October, 1919, to March, 1920, 3,000 cars were held without disposition for an aggregate period of 17,453 days—an average of 5.8 days per car—and incurred accrued demurrage and penalty charges amounting to a total of $76,529.

As growing distances between forests and market increase opportunities for price speculation, more and more middlemen are drawn into the trade. While the responsible wholesaler is an essential factor of the trade, a surplus of middlemen is an added burden of cost upon lumber distribution. It has been estimated that lumber brokerage and wholesalers' offices on the Pacific coast increased 50 per cent during 1919 and 1920. It is often the case that men drawn to the trade by its speculative possibilities are of the less responsible type, whose methods are not to the best interests of the trade and the public.

Speculation, with its accompanying sharp increases of lumber prices, tends to bring upon the

market, lumber in inferior condition. During the months following June, 1919, for example, a general complaint throughout the Middle West was that lumber was inadequately or improperly dried, due mainly to the fact that it was too rapidly seasoned in kilns. This, of course, may be attributed to the desire of the manufacturer to ship the lumber before high prices receded or at bid prices offered by jobbers."

(19) Railroads, by Permitting a Shipper to Use Their Idle Cars as a Warehouse or as a Place for Vending Its Contents, Are Not Then Functioning as Common Carriers Subject to the Act to Regulate Commerce, as Amended.

We also allege in the bill of complaint that the Commission was without jurisdiction to hold that it had the right to prevent the railroad companies from charging a rental for their idle equipment, which was not being used, and which had then no prospect of being used in connection with its business of transportation, and that the Commission had no right to hold the mere fact that railroad equipment was idle and without prospect of then present use in connection with its function of moving freight, that it permitted any person who had theretofore engaged such equipment for the purpose of traffic and transportation to continue to use it without payment to the railroad company for warehouse and storage purposes and that the Commission is without jurisdiction to compel a railroad to refrain from the use of sufficient means to prevent its equipment being used for storage and warehouse purposes. (Trans., 11.)

There is a well established rule that railroad companies, although public or common carriers subject to the Act, may contract as a private carrier. The Federal

Courts distinguish the duties of the railroad company from other duties assumed or undertaken to be discharged in another capacity; that is to say, where the right to contract for the performance in a different capacity from that which rests upon the railroad as a public or common carrier, is not *ultra vires*, it may contract for the doing of such act or the discharge of such service in such other or private capacity.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397; 32 L. Ed. 788; 9 Sup. Ct. Rep. 469.

Memphis & L. R. R. Co. v. *Southern Exp. Co.* 117 U. S. 1; 29 L. Ed. 791; 6 Sup. Ct. Rep. 542, 628.

New York C. R. Co. v. *Lockwood,* 17 Wall. 357; 21 L. Ed. 627.

Elliott, Railroads, 2nd Ed. Sec. 1396, and authorities collected; L. R. A. 1915 A, 366, note.

Analogous authorities are to the effect that there are services and rentals for which a railroad is not liable when not in the discharge of its duty as a common carrier.

Santa Fe, P. & P. R. Co. v. *Grant Bros. Construction Co.* 228 U. S. 177; 57 L. Ed. 787; 33 Sup. Ct. Rep. 474.

B. & O. S. W. R. Co. v. *Voigt,* 176 U. S. 498; 44 L. Ed. 560; 20 Sup. Ct. Rep. 385.

Memphis & L. R. R. Co. v. *Southern Express Co.* 117 U. S. 1; 29 L. Ed. 791; 6 Sup. Ct. Rep. 542, 628.

Elliott on Railroads, Sec. 1396.

New York C. R. Co. v. *Lockwood,* 17 Wall. 357; 21 L. Ed. 627.

U. S. v. *Erie R. R. Co.* 166 Fed. 352.

The doctrine:

> "One who engages in intertsate commerce thereby submits all his business relations to the regulating power of Congress is one, said Mr. Justice White (207 U. S. 502), that is refuted by the statement of it.
>
> * * * A railroad by engaging in interstate commerce does not thereby submit all its business relations to the regulating power of the Commission."
>
> *United States* v. *Erie R. R. Co* 166 Fed. 352.

As was said in the foot note in Volume 30, L. R. A. 162, in commenting on the case of *C. M. & St. P. Ry.* v. *Wallace,* 66 Fed. 506:

> "It would seem to be reasonable to hold that in performing a service which it was under no obligation to perform as a common carrier, if requested to do so, a railroad might well contract as a private carrier, and to hold that in this way it could not change the character of its service to that of a private carrier when performing services which the law requires it to perform whether it wished to do so or not."

It is said by Mr. Elliott in his work on Railroads (Vol. 1, 2nd Ed. Sec. 642), that mandamus will not lie against a railroad compelling the performance of a service or an act not clearly within its legal duties as a common carrier; and it must appear in the application for the writ (1) that defendant was obligated under the law to perform such act of service, and (2) that the petitioner has a legal right to demand the performance. Where there is a right of refusal by the common carrier to perform the service or act, there exists the right of contract for the performance of such act or service (if not *ultra vires*), in a different capacity from that which rests upon it as such common carrier.

We apprehend that it cannot be successfully maintained that mandamus would lie against the appellant

herein, as a common carrier railroad, and compel it to grant the use of its idle cars and other facilities as a warehouse and as a place for vending the contents of a car. The common law and the statutory obligation of a common carrier is to transport traffic and when it grants the use of its cars and facilities as a warehouse, it is not thereby functioning as a common carrier, subject to the Act to Regulate Commerce, as amended.

Nor is it the duty of a railroad to grant the use of its cars and facilities for storage and vending purposes any more than it is under an absolute duty to provide buildings for storing goods at all places where its freight trains stop. Nor has the shipper or consignee the right to assume that goods will be stored at such places.

Elliott on Railroads, 3rd Ed. Sec. 2297.

We repeat, that when a carrier grants such use of its cars and facilities that its obligation as a common carrier has ceased. In fact it might be compared to a carriers obligation when the right of stoppage in transitu has been properly exercised. In the latter case its liability as a common carrier has terminated and it holds as a warehouseman.

Elliott on Railroads, 3rd Ed. Sec. 2322.

Nor is it necessary that the railroad execute an express contract with a shipper when it grants the use of its cars and facilities for storage and vending purposes. As was said by Mr. Elliott on Railroads, 3rd Ed. Sec. 2210:

> "Goods may be received under a contract, expressed or implied, by a railroad in the capacity of a warehouseman * * *. Ordinarily, where goods are received for the purpose of being stored until ready for transportation they are in the possession of the company as a warehouseman."

The distinction between transportation which the railroad makes in its capacity as a common carrier and the furnishing of the use of its cars, tracks and other facilities, which it makes as a private carrier, was aptly recognized by the Supreme Court of Alabama in the case of

Ex Parte Alabama Great Southern R. R. Co. v. *Wood,* 90 So. 502; 19 A. L. R. 978.

In this case a railroad hauled the cars of a showman from city to city and then permitted such cars to stand on the side track of such railroad company during this showman's stay in a city for a period of 45 days. It was contended that a railroad company, which failed to file schedule of rates, fares and charges for transportation of property is prohibited from charging a track rental for the parking of such cars.

The Supreme Court, in reversing the judgment of the Court of Appeals, held that the parking of cars was not a service which the carrier was bound to furnish as a common carrier and that its failure to file rates for parking with the State Railroad Commission did not bar its right to compensation for the service.

The substance of the statutes of Alabama, relating to track and car service or rental and for switching, demurrage, terminal and transfer service and for endering any other service in connection with the transportation of passengers and property, are as the court said:

> "Such rentals and services as are to be charged by a railroad company in its capacity as a common carrier * * * do not extend to track rentals and car service of the nature and kind made the subject of this controversy."

Under notes (p. 987, Vol. 19, A. L. R.), it is stated:

> "The statues appear to be similar to the Federal Statutes relating to corresponding subjects in interstate commerce."

We are not unmindful of the doctrine established by this court in *Cleveland, C. C. & St. L. Ry.* v. *Dettlebach,* 239 U. S. 588, wherein the court said:

> "Under the Act to Regulate Commerce, as amended by the Hepburn Act of 1906, the term 'transportation' embraces all services in connection with the shipment, including storage of goods after arrival at destination."

Nor are we unmindful of the broad power over "transportation" as further delegated to the Commission by the Transportation Act of 1920, but it is in the unreasonable exercise of such delegated powers that we here complain of. The vice is in compelling the appellant to act in the dual capacity of both common carrier and warehouseman, when the Commission, by its order, compels railroads to function as a warehouse, which is in no legal sense "transportation," other than that the Commission, by the Act, may properly regulate the charges for certain accessorial services furnished in connection with the shipment.

The issues in this case do not involve the legal liability of a common carrier as a warehouseman, but they do involve the exercise of the delegated powers of the Commission, to compel the appellant to act as a wharehouseman, to the embarrassment of the carrier and to the injury of the public at large. The Commission has said in its report in this case (p. 29 of Transcript): "A railroad's function is to move traffic. The furnishing of storage is not a primary function." It is idle to state that railroad companies should have no control over their vehicles used for transportation. As was said in the case of *Norfolk & Western R. R.* v. *Adam Clement,* 22 L. R. A. 530, 534:

> "The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; *and they must have control over their cars in order*

to perform their duties to the public. A car in motion is a useful thing but a car standing *idle* and unloaded on the track *is useless and an encumbrance.* If 'A' be allowed to hold a car at his pleasure or convenience without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of 'B' it is evident that both the railroad company and the shipping public will suffer injury." (Italics ours.)

The Commission has repeatedly said (45 I. C. C. 494, 500):

"The use of a car by a shipper as a place for vending its contents to the public *is not a service of transportation,* either at common law or under the Act to Regulate Commerce."

There is an essential difference between the "service of transportation," which must be furnished and paid for and the "accommodation" of storage. Broadly speaking, the former is a right which the carrier cannot deny or abridge; the latter is a privilege which the carrier should be at liberty to accord or refuse; one is obligatory and the other optional. This distinction is recognized in the regulating statute, which requires the carriers' schedules to state separately, the charges for "storage," "reconsignment" and certain other accessorial services, optionally furnished by a common carrier. The freight rate in force, at a given time, is the unit by itself which measures, while it remains in force, the liability of a shipper for the "service of transportation." But that service is wholly disconnected, in fact and law, with the optional allowance of yard storage when a shipper so uses a carriers equipment for the purpose of sale.

Such distinction was clearly recognized in *Chesapeake & Ohio Coal & Coke Co.* v. *Toledo & O. C. Ry.* 245 Fed. 917.

And as the Commission has said:

> "Storage of property transported is transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in Section 1 of the Interstate Commerce Act in that limited sense."
>
> *Guaranty Claim of Central Elevator Co.* 72 I. C. C. 175, 176.

When a railroad is employed as the agency to transport the freight of a shipper, there is an implied agreement that the equipment of the railroad will be used for a lawful and specific purpose, to wit, transportation. The mere fact that a railroad optionally grants a reconsignment privilege, under terms stated in its published tariffs, does not, expressly, or impliedly authorize the shipper to convert this reconsignment privilege into a means of indefinite storage, nor permit the shipper to use the carrier's equipment for the purpose of sale. This is well recognized in the many decisions of the Commission cited, *supra,* and is the holding of the Commission in this case in controversy.

Consequently, it may be stated generally, that if the thing (a railroad car) is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, by the hirer, there is an invasion of the owner's right of property as complete as if the owner's control over the property were usurped.

The circumstances and principles of law applicable to this case are comparable with the principles of law when there is a breach of a contract of bailment.

Where a cause of action is one to recover damages for breach of a contract of bailment it is a matter over which it is clear the Commission has no jurisdiction.

Empire Refineries v. *Guaranty Trust Co.* 271 Fed. 668.

In said case the syllabus reads:

> "A tank car, owned by the shipper, filled with gasoline, was delivered to a railroad company for the transportation of gasoline to a consignee under a bill of lading, which entitled the owner to payment for the use of the car on a mileage basis. The car was not delivered to the consignee but diverted, and was not returned to the owner for three months. HELD, that the railroad company was a bailee for hire of the car, and that the contract of bailment was for its use only in accordance with the bill of lading; that its diversion was a breach of the contract, and whether intentional or through negligence, rendered the railroad company liable for all damages sustained by the owner, including the value of its use while detained."

In determining whether or not the Commission, in the case at bar, has exceeded its powers, or unreasonably exercised the same, we respectfully submit that it is the duty of this court to look at the real substance of the transaction and not the shadow or form of the service. Mere tariffs, billing or forms of contract are not necessarily determinative of the character of the transaction.

(20) The Finding of the Commission—"There Is Now a Large Surplus of Serviceable Empty Cars and, Generally Speaking, No Congestion in the Country"—Is Broader Than the Issues Involved; It Is an Arbitrary Finding Without Evidence and Therefore Void.

Another reason why in our opinion the order of the Commission is arbitrary and, therefore, void is that their specific finding "There is now a large surplus of

serviceable empty cars and, generally speaking, no congestion in the country," is really broader and not confined to the issue involved and is an arbitrary finding without evidence. It is in the nature of a "dictum" or opinion expressed by the Commission which not being necessarily involved lacks the force of an adjudication.

The issues before the Commission for consideration were whether or not this $10 charge was "unreasonable, unjustly discriminatory and unduly prejudicial" and, therefore, unlawful (Page 16 of Transcript.) The Commission found as to each one of these facts and said, that the $10 charge was neither unreasonable, unjustly discriminatory, unduly prejudicial nor unlawful. (Pages 19 and 27 of Transcript.) In other words they really found, with our view, as to such facts as were in issue in the bill of complaint which was before it for consideration. The Commission states on page 16 of Transcript, the

> "Complaint No. 11818 * * * attacks as unreasonable, unjustly discriminatory and unduly prejudicial the so-called penalty charge of $10 per car * * *. *By agreement between the parties the evidence was directed solely to the lawfulness of the charge.*" (Italics ours.)

It is true that in their report they state:

> "Car shortages have resulted in incalculable loss in the past, both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation, the carriers are justified in taking steps to prevent such abuses."

Also on page 25 of Transcript they show why in their opinion the Director General established the penalty charge here in issue and said:

> "Following a heavy surplus of cars after the signing of the armistice in 1918, and early in 1919,

there was a rapid decrease in idle cars, and by October 1, 1919, a serious car shortage threatened. Campaigns for heavy loading and for prompt loading and unloading, which had been conducted prior to the period of depression in the early months of 1919 were again inaugurated by the Director General. Committees which had been created at strategic points throughout the country to collect data as to transportation conditions and car service in such sections prior to 1919, and which had been disbanded in the early months of that year, were reorganized. Business rapidly increased, and, as it was impossible to obtain new equipment, the car shortage became more serious and threatening, notwithstanding the efforts of the Railroad Administration. Reports of inspectors and committees indicated a heavy detention of cars containing lumber awaiting reconsignment. In September, 1919, special inquiry was made at about 30 widely separated points to determine the extent of this detention. Reports were received covering various periods during August, September and October, 1919. These reports showed an average detention of 7.9 days for cars of lumber held for reconsignment. In view of the conditions the Director General established the charge here in issue."

But can it be said, by such expressions of the Commission that the question "fairly arises in the course of the trial." As to the specific finding of the Commission:

> "There is now a large surplus of serviceable empty cars and generally speaking, no congestion in the country"?

This Court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties. *Carroll* v. *Carroll*, 16 How. 275, 287.

A "dictum" is an opinion expressed but which not being necessarily involved lacks the force of an adjudication. *Rush* v. *French* 25 Pacific 816, 825, 828.

In *Re: Woodruff* 96 Fed. 317, 321.

Nor can it be argued that either the original Act to Regulate Commerce or the Transportation Act of 1920 authorizes the Commission to make a finding without evidence. As any finding by the Commission without evidence is beyond the power of the Commission, and if Congress attempted to delegate to the Commission authority to make a finding without evidence such an Act would be unconstitutional and void. Whether an act done under color of a power granted is actually within the terms of the grant of power must always be a fundamental inquiry, when the validity of the efficacy of the Act is in question.

Mr. Justice Lamar, in speaking for this Court in the first case cited below said:

> "A finding without evidence is arbitrary and useless, and an act of Congress granting authority to anybody to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power condemned by the constitution * * *. The legal effect of evidence is a question of law, and a finding without evidence is beyond the power of the Commission * * *. An order based thereon is contrary to law and must in the language of the statute be 'set aside by a court of competent jurisdiction.'"

Interstate Commerce Commission v. *L. & N. R. R.* 227 U. S. 88, 57 L. Ed. 431.

Interstate Commerce Commission v. *Union Pacific R. Co.* 222 U. S. 541, 56 L. Ed. 308, 311.

Florida East Coast R. Co. v. *United States* 234 U. S. 167, 58 L. Ed. 1267.

Phila. & Reading v. *United States,* 240 U. S. 334, 60 L. Ed. 675.

Meeker & Co. v. *Lehigh Valley Co.* 236 U. S. 412, 59 L. Ed. 644.

The Commission, as a quasi judicial body, has no authority to issue its administrative fiat on an abstract or moot question which was not the actual subject of controversy and upon which there was no evidence before it.

Security Insurance Co. v. *Prewitt* 200 U. S. 446, 50 L. Ed. 545.

Tyler v. *Judges* 179 U. S. 409, 45 L. Ed. 254.

(21) The Commission by Its Order and the Unreasonable Exercise of Its Powers Has Perpetuated a Condition That Deprives Appellant of Its Property Without Due Process of Law and Takes Its Property for the Private Use of Another Without Just Compensation, in Violation of the 5th Amendment of the Constitution.

The Commission specifically found that transportation, reconsignment, demurrage and this use by the speculative element were separate services; each one of which ought to be paid for separately and that demurrage did not cover the service for which this $10 charge was imposed. Therefore, the unescapable and irresistable conclusion is that every time an owner of lumber on a transit car obtains the use of the car for storage and sale, he obtains this service for nothing. He makes the carriers facilities his warehouse or depot, for his own beneficial purpose of storage and sale. Such use of a car at the reconsigning point is wholly independent of the subsequent or prior movement, as the case may be. For each separate use of a car a carrier is entitled to make a separate charge. Such use entails additional expense and disadvantages to the carrier, which do not attach to through shipments, including switching, detention of inbound equipment, absorption of outbound switching charges in certain cases and expense of accounting and

readjusting revenues. Such use, therefore, depletes the carriers revenues and while its equipment is so used the carrier is being arbitrarily deprived of using its equipment in revenue service and in fulfilling its common carrier obligations to the public.

No proof is necessary in support of above statements. The Commission has recognized each one of the same in the cases cited, *supra.*

Furthermore, as a result of the Commission's order, and the unreasonable exercise of its powers, the Commission compels the appellant herein to permit any person who comes lawfully into possession of equipment of appellant for purposes of transportation to use it for another purpose, provided the appellant did not require such equipment for transportation, which is in violation of its constitutional right to the use of its own property, and particularly in violation of the 5th amendment of the constitution of the United States.

We deem it unnecessary to further trespass on the time of this Court by further amplification. We respectfully submit the allegations in the bill of complaint and the illustrations contained in this brief, conclusively show that the Commission by its order in this case and the unreasonable exercise of its delegated powers, has perpetuated a condition that deprives appellant of its property without due process of law, and compels it to permit the use of its equipment for storage and sale, without compensation and interferes with the constitutional right of carriers by railroads to the use of their property in violation of the 5th amendment of the Constitution of the United States.

A railroad, although it is under Government regulation and control, it is recognized that that control must

be exercised with due regard to constitutional guarantees for the protection of its property.

L. S. & M. S. Ry. v. *Smith* 173 U. S. 684, 690.

And as stated by Mr. Justice Sanborn, in speaking for the three judges of the Circuit Court in *Peavy & Co.* v. *U. P. R. Co.* 176 Fed. 409, 418 (Aff. in 222 U. S. 42.)

> "The power is vested in and the duty is imposed upon the Courts to relieve from orders of the Commission which deprive complainants of the property without due process of law or to take it without just compensation in violation of the 5th amendment to the Constitution, from orders which are beyond the limits of the power delegated by the Act of Congress to the Commission and from orders which though in form within its delegated power, *evidence so unreasonable an exercise of it that they are in substance beyond it.*" (Italics ours.) Similar rulings are also referred to in the following cases:
>
> *Interstate Commerce Commission* v. *I. C. R. R.* 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155.
>
> *Interstate Commerce Commission* v. *Stickney* 215 U. S. 98, 3 Sup. Ct. 66, 54 L. Ed.
>
> *M. K. & T. R. R.* v. *I. C. C.* 164 Fed. 645, 648,

Furthermore:

> "Neither Congress nor any legislative nor administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered, as under all the circumstances is just and reasonable, since such action would deprive it of its property without due process of law, and would be taking of its property for public use without just compensation, in violation of the 5th amendmentof the Constitution."
>
> *M. K. & T. R. Co. et al.* v. *I. C. C.* 164 Fed. 645.

The 5th amendment applies to an intangible right as well as to tangible property.

Monongahela Co. v. *United States,* 148 U. S. 312, 343.

Oklahoma v. *Kansas Nat. Gas Co.* 221 U. S. 229, 253.

Indeed, a pecuniary loss need not be shown, if the right of property is invaded, the statute is within the constitutional provision, as was stated:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> *Buchanan* v. *Warley,* 245 U. S. 60, 74.

It is with respect submitted that the Bill of Complaint states sufficient facts and contains a valid cause of action upon which the appellant is entitled to relief and that the motion to dismiss should not have been granted and that the judgment of the lower court should be reversed.

Respectfully submitted

WILLIAM S. BENNET,
HOMER J. SMITH,
EDWARD W. MCGREW,
Solicitors for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD HINES YELLOW PINE TRUSTEES, Edward Hines, C. F. Wiehe, and L. L. Barth, Trustees, appellants,
v.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.
No. 31.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Arguing that the bill of complaint "is addressed to the conscience of the Chancellor" (Br. 20), and stating that "*We agree with every finding of fact and of law made by the Commission in its report,*" and that the complaint "is directed to the conclusion drawn from the findings of fact and law" (Br. 27), counsel for appellant argue that the decree of the District Court sustaining motion to dismiss the bill should be reversed.

65558—23

In order "to prevent undue detention of equipment under present emergency," and to provide an adequate transportation system for the prosecution of the World War, the Director General of Railroads, on October 20, 1919 (Tr. 17), established the so-called penalty charge of $10 per car for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules (Tr. 16). That penalty was in addition to any existing demurrage or storage charge (Tr. 17).

On December 1, 1919, the charge was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel, or crate material, and other forest products on which the lumber rate applied. On February 29, 1920, the charge was made to expire June 1, 1920. Subsequently, schedules were filed to continue the penalty without expiration date. (Tr. 17.)

American Wholesale Lumber Association, an organization of 325 wholesale distributors of lumber, attacked as unreasonable, unjustly discriminatory, and unduly prejudicial the penalty charge. The National Retail Lumber Dealers Association and Southern Pine Association protested the cancellation, and before the Interstate Commerce Commission those organizations were defendants. After a full hearing and a very elaborate report, the form of which is not questioned, the Commission, on February 11, 1922, found (Tr. 29) "that conditions

existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars and, generally speaking, no congestion in the country."

Accordingly, it entered its order directing the carriers, on or before March 13, 1922, to cease and desist from any longer collecting the penalty (Tr. 39).

On May 11, 1922, two months after practically all of the railroads of the country accepted the order and voluntarily put it in force and effect by their tariffs duly published and filed, Edward Hines Yellow Pine Trustees, a common law trust, filed the bill of complaint alleging that the order of the Commission "is assisting in the continuance of evils in the lumber industry, injurious alike to the manufacturer, the wholesaler, the retailer, and the consumer, and is compelling the railroads of the country to refrain from assisting the Department of Commerce and the Lumber Industry in fighting these evils; * * *." (Tr. 12.)

Circuit Judge Page and District Judges Carpenter and Geiger promptly sustained the motion to dismiss the bill (Tr. 42, 43, 44) and the appeal was taken.

II.

ARGUMENT.

Appellant fails to disclose the nature of the "common law trust" or "the lumber manufacturing enterprise" operated by such common law trust, or the nature of the railroad which the common law trust

is "just completing" between Lumberton and Kiln, Mississippi, which the common law trust "intends operating as a common carrier of freight by railroad," or in what particular such common law trust will "in certain matters become subject to the provisions of the various acts of Congress." (Tr. 3.)

The substratum of the bill appears to be that appellant is a lumber manufacturing enterprise in Mississippi (Tr. 3); that the Trustees are also directors in corporations manufacturing lumber in other parts of the United States, and also directors in the corporation engaged in the wholesale selling of lumber with headquarters in the City of Chicago, which corporation also operates a number of retail yards in the City of Chicago. While it is not so specifically alleged, the bill would appear clearly to indicate that appellant is a large manufacturer, wholesaler, and retailer of lumber throughout the Mississippi Valley.

In the lumber industry there are two general classes of mills—the large mill, which cuts 10,000,000 feet and over annually, and the small mill, which cuts less. (Tr. 17.) In 1918 there were 785 large mills and 21,781 small mills, constituting 4 and 96 per cent, respectively, of the total number of mills. These produced 60 and 40 per cent, respectively, of the total lumber. (Tr. 17.)

The charge appears to be that the order of the Commission directing the carriers to eliminate the penalty (which the latter have done) compels the carriers "to permit the use of their equipment for storage and warehouse purposes without accepting

charge for that use," and compels the carriers "to permit the *speculative element* to compete with the wholesaler and retailer who have large investments in business on a basis unfair to the wholesaler and retailer and *particularly advantageous to the speculator* at the same charge to the speculator as is charged to the wholesaler and retailer." (Tr. 12.)

It is difficult to perceive wherein such an order is prejudicial to any shipper of lumber. Certainly the allegations concerning it can not form the basis of equitable jurisdiction. If appellant succeeds in having the penalty restored, it may be that appellant will not be affected as, being a large shipper with ample yards and equipment, it can move and unload the cars with such dispatch as to escape the penalty; whereas, the little shipper, without such yards and equipment, will be subjected to the penalty with the consequent burden on his business. If that is the case of the appellant, it certainly does not shake the conscience of a court of equity.

Appellant further charges that the order is an imposition on the carriers. (Tr. 11.) No carrier has come forward with any protest. It is reasonably safe to assume that if any carrier's rights are seriously affected it is able to employ counsel to represent it. Contrary to any such course the carriers have accepted the provisions of the order without contest.

The carriers are not parties to the suit, and if appellant should prevail there must be some further affirmative action by the Commission directing the

carriers to restore the penalty before appellant has made its point.

Appellant charges that, under the principle of the order of the Commission if carried to its logical conclusion, the locomotives and freight cars and other railroad equipment which will be used upon the railroad which it "is just completing" and which it "intends operating as a common carrier of freight by railroad" will "compel the plaintiff to permit any person who comes lawfully into possession of any of the equipment of the plaintiff for purposes of transportation to thereafter retain it for another purpose." (Tr. 12.) It does not appear how many locomotives and freight cars are owned by appellant, nor to what extent appellant publishes and files tariffs. The most that is alleged is that "it will, in certain matters, become subject to the provisions of the various acts of Congress," et ceteras. (Tr. 8.)

On its face the order of the Commission would appear to be in favor of the appellant; nevertheless appellant seeks to have the order annulled and the penalty restored because of the burdensome effect of the penalty on its competitors, thus curing the "evils in the lumber industry." Such a case does not form the basis of equitable jurisdiction.

III.

CONCLUSION.

The decree of the District Court should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD HINES YELLOW PINE TRUSTEES, appellant,
v.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees.

} In Equity, No. 91.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, sustaining a motion to dismiss filed by the United States, Appellee, and dismissing the bill of complaint. The appellant here was the plaintiff in the lower court, and the relief it is seeking is shown by the first paragraph of the prayer of the bill, which reads as follows:

> Wherefore, as it is without adequate remedy at law for its protection in this matter, plaintiff prays that the said order of the said Interstate Commerce Commission of February 11, 1922, in the proceeding of the said Interstate Commerce Commission known as Docket 11818, be set aside and that all proceedings thereunder be

> enjoined; that pending the issuance of a perpetual injunction herein, this Honorable Court may grant an interlocutory injunction herein, restraining the said defendant, its agents, servants, and each of them, from doing any act under and by virtue of the said hereinbefore mentioned order until the final hearing, or the further order of this court; and that before the hearing and determination of plaintiff's application for an interlocutory injunction, this Honorable Court may grant a temporary restraining order, restraining said defendant, its agents and servants, and each of them, from doing any of the above-mentioned acts until the hearing and determination of plaintiff's application for interlocutory injunction herein. (Rec. 12.)

The order referred to was made and entered by the Commission in proceedings before it which included, in addition to said Docket No. 11818, Sub-Nos. 1 to 13, inclusive. (Rec. 31.)

The language of the order, which was served upon a large number of interstate common carriers, to the extent that same is material here, is:

> These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before March 13, 1922, and thereafter to abstain, from publishing, demanding, or collecting the penalty charge of $10 per car per day on lumber and other forest products held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules.

And it is further ordered, That this order shall continue in force until the further order of the Commission. (Rec. 38–39.)

In its report, in describing the parties, the business done by them, and the manner in which they were affected by the penalty charge mentioned in the order, the Commission, among other things, said:

> Complainant in No. 11818, an organization composed of 325 wholesale distributors of lumber, attacks as unreasonable, unjustly discriminatory, and unduly prejudicial the so-called penalty charge of $10 per car for each day or fraction thereof that cars, loaded with lumber and other forest products, are held for reconsignment beyond 48 hours after the hour at which free time begins to run under the demurrage rules. In the sub-numbered dockets we are asked to award reparation against the Director General of Railroads on shipments upon which the charge was collected during Federal control. The allegations in those complaints are substantially the same as the allegations in No. 11818. By agreement between the parties the evidence

was directed solely to the lawfulness of the charge. Various lumber and lumber products manufacturers' and dealers' associations were permitted to intervene, some on behalf of complainants and others on behalf of defendants. (Rec. 16.)

* * * * *

The penalty charge applied originally on lumber only, and was established by the Director General on October 20, 1919. The schedule naming the charge stated that it was "to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." On December 1, 1919, it was published in the uniform demurrage tariff, and was made applicable on lumber, shingles, poles, piling, mine timber, box, barrel, or crate material, and other forest products not further finished than sawed or dressed, and on all forest products on which the lumber rate applies. All these commodities will hereinafter be termed lumber. Prior to August 19, 1920, the penalty charge was applied on cars held on Sundays and legal holidays. On that date the charge was made subject to the provisions of the national car demurrage rules which provide that Sundays and legal holidays shall be excluded in computing time. By tariff supplement effective February 29, 1920, the penalty charge was made to expire June 1, 1920, and by later schedules extended so as to expire with the close of business January 1, 1921. On December 2, 1920, schedules were filed to continue the penalty

charge after January 1, 1921, without expiration date. The schedules were protested by complainant and others, but we permitted them to go into effect.

There are two general classes of mills in the lumber industry, the large mill, which cuts 10,000,000 feet and over anually, and the small mill, which cuts less than that amount. In 1918 there were 785 large mills and 21,781 small mills, constituting 4 and 96 per cent, respectively, of the total number of mills. These produced 60 and 40 per cent, respectively, of the total lumber.

The large mills purchase large tracts of timber which will provide operations for a number of years. Such mills are equipped with modern machinery, have large yards, in most cases where lumber can be graded and piled according to quality and size, and generally operate planing mills for the manufacture of siding, roofing, lining for railroad cars, etc. Some of them have their own sales organizations and maintain retail yards.

Generally the small mill is portable; it can be operated on one tract for a few years and then removed to another. It usually follows the large mill and cuts small tracts of timber which have been left, or goes back over cut-over lands and small areas that the large mill could not reach. The small-mill operator usually has only a small amount of capital, and, except for such stock as may be sold locally, disposes of his lumber largely through wholesalers, who often advance money for

the stumpage and sometimes for the pay roll for manufacturing. In such instances they retain title to the stumpage as security, and they have the mill load the lumber as early as possible.

When loaded, the mill bills the lumber to the wholesaler at a reconsignment point and receives an advance against the shipping documents. Upon arrival of the car at the reconsignment point the local agent notifies the consignee. The tariff permits one reconsignment on lumber and the demurrage rules allow 24 hours free time on cars held for reconsignment. As stated, the penalty charge does not begin to accrue until 48 hours after the hour at which free time begins to run. Upon receipt of the invoice from the mill the wholesaler lists the car in his transit list. These lists are issued triweekly, and are circulated among the trade in an effort to secure purchasers for the shipment. A corrected list giving information as to the cars sold is sent to the wholesaler's salesmen daily. If any of the unsold cars on the list have been reported as reaching the reconsignment point, the salesmen are instructed to give such cars immediate attention. Moreover, night telegrams are sent to salesmen and dealers in an effort to secure immediate sales. (Rec. 17–18.)

After reviewing the evidence in the record before it and stating that the penalty charge was established and put in force by carriers to prevent the undue detention of cars loaded with lumber during

periods of time when the number of cars available was not sufficient to meet the requirements of shippers, and after showing that, in a material degree, the penalty charge served the purpose it was established to accomplish, the Commission made findings and reported its conclusions as follows:

> A railroad's function is to move traffic. The furnishing of storage is not a primary function. The free time provided for loading, unloading, and reconsignment has been fixed as the reasonable time within which cars should be released and made available for further movement. The shipper has no inherent right to detain a car beyond the free time and thus prevent it from being used for transportation by other shippers. Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation the carriers are justified in taking steps to prevent such abuses.
>
> We find that conditions existing at the time warranted the establishment of the penalty charge and that it was not unreasonable or otherwise unlawful. There is now a large surplus of serviceable empty cars, and, generally speaking, no congestion in the country. In the past car shortages at times have followed quickly upon periods of car surplus. It is impossible to forecast the

> continuance of present conditions or what will be the conditions when the normal stride in business is reached. We are of the view that there is no justification for the charge at the present time, and we find that while present conditions continue it is and will be unreasonable.
>
> The respondents in the suspension case have justified the cancellation of the penalty charge.
>
> It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and it is not to be construed as an inhibition on the carriers to publish penalty charges in the future if and when conditions warrant. (Rec. 29–30.)

In the lower court, the Commission and the American Wholesale Lumber Association intervened and filed answers to the bill of complaint. Since that court based its judgment and decree upon the motion to dismiss filed by the United States, the answers were not included in the record in this court.

The motion to dismiss may be summarized as follows:

> 1. Appellant has not, in and by its bill of complaint, shown such an interest in the subject matter of the order of February 11, 1922, as is necessary to enable it to maintain this suit.
>
> 2. There is no equity in the bill of complaint.

ARGUMENT.

I.

APPELLANT HAS NOT, IN AND BY ITS BILL OF COMPLAINT, SHOWN SUCH AN INTEREST IN THE SUBJECT MATTER OF THE ORDER OF FEBRUARY 11, 1922, AS IS NECESSARY TO ENABLE IT TO MAINTAIN THIS SUIT.

In the bill of complaint, as amended, there are ten paragraphs, which we summarize as follows:

In the first paragraph it is alleged that appellant is a common-law trust, engaged in operating a lumber manufacturing enterprise in the southern part of the State of Mississippi, and in constructing a railroad in that state, which appellant intends to operate in such a manner that, as to certain matters, it will become subject to the provisions of the Act to Regulate Commerce.

In the second paragraph it is alleged: That this suit involves a question arising under the Constitution and laws of the United States; that the amount involved is in excess of $3,000; that the suit is of a civil nature; that the order of February 11, 1922, was made and entered by the Commission in proceedings upon a complaint filed in the Commission's office by the American Wholesale Lumber Association; that the legal residence and place of business of said Association is in the City of Chicago in the State of Illinois; and that Edward Hines, C. F. Wiehe and L. L. Barth are the duly appointed operating Trustees of the appellant.

In the third paragraph it is alleged: That the trustees of appellant are directors in corporations

engaged in the manufacture of lumber in other parts of the United States, and in a corporation which sells lumber at wholesale and retail in Chicago; that one of said corporations manufactures hardwood and hemlock in Wisconsin; that appellant manufactures yellow pine in Mississippi; that the corporation engaged as aforesaid in selling lumber at wholesale and retail purchases and sells practically all varieties of hardwood and soft woods used for lumber; that said trustees have been engaged for many years in the lumber business and are acquainted with the business in all its phases; that said business is highly competitive; that among the customers to whom manufacturers of lumber sell are retail yards and large industries; that at and during the World War, and since, incompetent and disloyal employes have been put in the places of former employes who were more competent and loyal; that during the last few years there has developed in the lumber business a group of speculators who do not own any manufacturing plants or yards, but who maintain offices for the purpose of buying from manufacturers and selling to others; that said speculators use the lumber industry as a means of making money by speculating in its product; that speculation finally led to fraudulent practices, as between lumber dealers, which were described at a meeting of the Southern Pine Association in New Orleans on March 29, 1922, in language set forth in the paragraph; that on the following day the association adopted resolutions as set forth in the paragraph; that perti-

nent language used by Secretary Hoover in a public speech made by him in Chicago on April 4, 1922, was as set forth in the paragraph; that on April 5, 1922, the National Lumber Manufacturers' Association indorsed the position of Secretary Hoover and adopted resolutions as set forth in the paragraph; that on April 6 and 7, 1922, the American Lumber Congress adopted resolutions as set forth in the paragraph, and that, for reasons stated in the paragraph, one of the instrumentalities which lends itself to said fraudulent practices is the Transit Car; that is to say, a carload of lumber "shipped from the manufacturing plant with no customer and in the hope that a customer may be obtained before its arrival at the destination to which it is first consigned."

In the fourth paragraph it is alleged: That with a knowledge of the facts above set forth the Director General of Railroads, on October 20, 1919, established the penalty charge involved in this suit, which was continued in force until January 1, 1921; that on December 2, 1920, the various railroads filed schedules with the Commission to continue the penalty charge in force after January 1, 1921, without date of expiration; that although the schedules were protested the Commission allowed them to go into effect; that on September 10, 1920, the American Wholesale Lumber Association filed with the Commission a complaint against the penalty charge, known as No. 11818, and that on February 11, 1922, the Commission rendered its decision upon said complaint, which is Exhibit A to the bill of complaint.

In the fifth paragraph it is alleged that the Commission made findings and an order as set forth in the paragraph.

In the sixth paragraph it is alleged: That by its order, based upon its decision that "There is now a large surplus of serviceable, empty cars, and generally speaking, no congestion in the country," the Commission prevented the railroads from joining the great bulk of the lumber industry in the suppression of the evil and dishonest practices above mentioned; that the Commission erroneously held that it had a right to prevent the railroad companies from charging rental for their idle equipment, and that the fact that the equipment was idle gave to anyone who had previously engaged it for transportation purposes a right to continue to use it without payment to the railroad company for warehouse and storage purposes, and that, for reasons stated in the paragraph, the order compels railroad companies to lend themselves to unfair competition between lumber dealers.

In the seventh paragraph it is alleged: That appellant owns locomotives and freight cars which it intends to use in connection with the operation of the railroad it is constructing, and that the principle of said order of February 11, 1922, if carried to its logical conclusion, will compel appellant to permit any person who comes lawfully into possession of the equipment for transportation purposes to retain it for other purposes, provided appellant does not re-

quire it for transportation purposes, in violation of the Fifth Amendment to the Constitution of the United States.

The eighth, ninth, and tenth paragraphs read as follows:

> Eighth. That, by its said order of February 11, the Interstate Commerce Commission is assisting in the continuance of evils in the lumber industry, injurious alike to the manufacturer, the wholesaler, the retailer, and the consumer, and is compelling the railroads of the country to refrain from assisting the Department of Commerce and the Lumber Industry in fighting these evils; is compelling the railroads of the country to lend themselves to speculation of a character which in turn lends itself easily to fraud and deception upon the lumber consumer; is compelling the railroad companies to permit the use of their equipment for storage and warehouse purposes without accepting charge for that use, and is compelling the railroad companies to permit the speculative element to compete with the wholesaler and the retailer who have large investments in business on a basis unfair to the wholesaler and retailer and particularly advantageous to the speculator at the same charge to the speculator as is charged to the wholesaler and retailer.
>
> Ninth. Plaintiff further shows that said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because not within any jurisdiction granted the Interstate Commerce

> Commission under an Act to Regulate Commerce, approved February 4, 1887, or any act amendatory thereof or supplementary thereto conferring jurisdiction on the Interstate Commerce Commission.
>
> Tenth. It further shows that the said order of said Interstate Commerce Commission of February 11, 1922, is null and void and of no effect, because it interferes with the constitutional right of carriers by railroad to the use of their own property and compels the said carriers to permit the use of their property without compensation, in violation of the Fifth Amendment to the Constitution of the United States. (Rec. 3–12, 41.)

It will be observed that appellant does not allege either that it was a party to the proceedings before the Commission or that it is a party to the order whose validity it is challenging in this suit. In support of its right to institute and maintain the suit it appears to rely instead upon the effect the order has and will have upon the carriers therein named. The question thus presented for determination is the same in principle as one which was involved in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 88, wherein this court said:

> It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. It is very clear that by a voluntary reduction by them of such rates the equality of opportunity dependent

> upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark* v. *Kansas*, 196 U. S. 447. (Id. 109.)

If a carrier can not properly complain of an order of the Commission as it may affect shippers, it would seem to follow that the right of a shipper to institute and maintain a suit in court for the purpose of challenging the validity of an order of the Commission can not be supported by allegations tending to show how the order does or may affect a carrier, or carriers.

And we believe it to be equally clear that appellant's right to institute and maintain this suit can not be supported by its allegation to the effect that it is constructing a railroad in Mississippi which it intends to operate in such a manner that, as to certain matters, it will become subject to the provisions of the Act to Regulate Commerce.

II.

THERE IS NO EQUITY IN THE BILL OF COMPLAINT.

Regardless of appellant's right to institute and maintain this suit, we think it is apparent that there is no equity in the bill of complaint. Appellant does

not contend that there was any irregularity in the proceedings before the Commission, and it admits that the Commission found the penalty charge to be unreasonable. This finding constitutes a sufficient basis for the order under consideration, and, therefore, unless there is some reason why the finding should be disregarded, the order will be sustained as valid by the court.

In a case of this kind the courts exercise jurisdiction only for the purpose of determining whether in making the order involved the Commission has acted beyond the authority conferred upon it by the Interstate Commerce Act, or has taken action which is in conflict with the Constitution of the United States. This rule has been announced many times, and was clearly and concisely stated in *Procter & Gamble* v. *United States*, 225 U. S. 282, from which we quote as follows:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exer-

> cised as virtually to transcend the authority conferred, although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452. (Id. 297–298.)

That the order is regular in form is not denied, and that its subject matter is within the jurisdiction of the Commission can not, we submit, be successfully contradicted. The term "transportation," as used in the Interstate Commerce Act, is defined in paragraph 3 of section 1 of the act as including—

> * * * locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Paragraph 4 of said section reads in part as follows:

> It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *.

In paragraph 5 of said section it is provided that—

> All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreason-

able charge for such service or any part thereof is prohibited and declared to be unlawful. * * *.

By section 1 of the act the Commission is clothed with jurisdiction over the transportation, charges, and carriers covered by the language above quoted, and by section 12 it is required to execute and enforce the provisions of the act.

That the carriers named in the order of February 11 are subject to the act is not, and of course will not be, denied.

As hereinbefore shown, the Commission found that it was proper for carriers to publish and exact the penalty charge only in times of emergency; that is to say, when the number of cars available is not sufficient to meet all requirements of shippers, and that at the date of its report there was a large surplus of serviceable, empty cars, and, generally speaking, no congestion in the country. According to our understanding, appellant has not undertaken to show that any of these findings is incorrect, and we are unable to see how such a showing could be made where, as here, the record which was made in the proceedings before the Commission has not been placed before the court for examination and consideration.

Under these circumstances we think it is apparent that, in making the order of February 11, the Commission did not act arbitrarily within the judicial meaning of that term.

Appellant alleges that the order is in violation of the Fifth Amendment to the Constitution of the United States, because it compels carriers to permit shippers to use cars without paying, to the carriers, compensation for such use. This allegation, however, is in conflict with statements of fact contained in the Commission's report. In this connection, and in speaking of the penalty charge, the Commission said:

> * * * The schedule naming the charge stated that it was "to prevent undue detention of equipment under present emergency" and "is in addition to any existing demurrage or storage charge." * * * (Rec. 17.)
>
> The right of the carriers to assess charges for undue detention of equipment existed at common law, and such charges are now published in schedule form in accordance with the provisions of the interstate commerce act. It is settled that we may require the carriers to maintain reasonable demurrage charges, which are in part compensation to the carriers for use of their equipment and in part penalties imposed on shippers for detention of cars. A charge in the nature of a penalty is not unlawful if its purpose is to secure for the public a more efficient use of equipment. While it should not be so high as to work an undue hardship upon the shipper, who must occasionally pay it, it should be sufficient in amount to accomplish the purpose for which it is intended.

> We have in a number of cases considered and approved charges, established by carriers, which admittedly were in part penalties to prevent detention of equipment by shippers. * * * (Rec. 18–19.)
>
> It should be clearly understood that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on the carriers to publish penalty charges in the future, if and when conditions warrant. (Rec. 29–30.)

For the reasons above set forth we insist that the appeal in this suit should be dismissed.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission, Appellee.

OCTOBER, 1923.

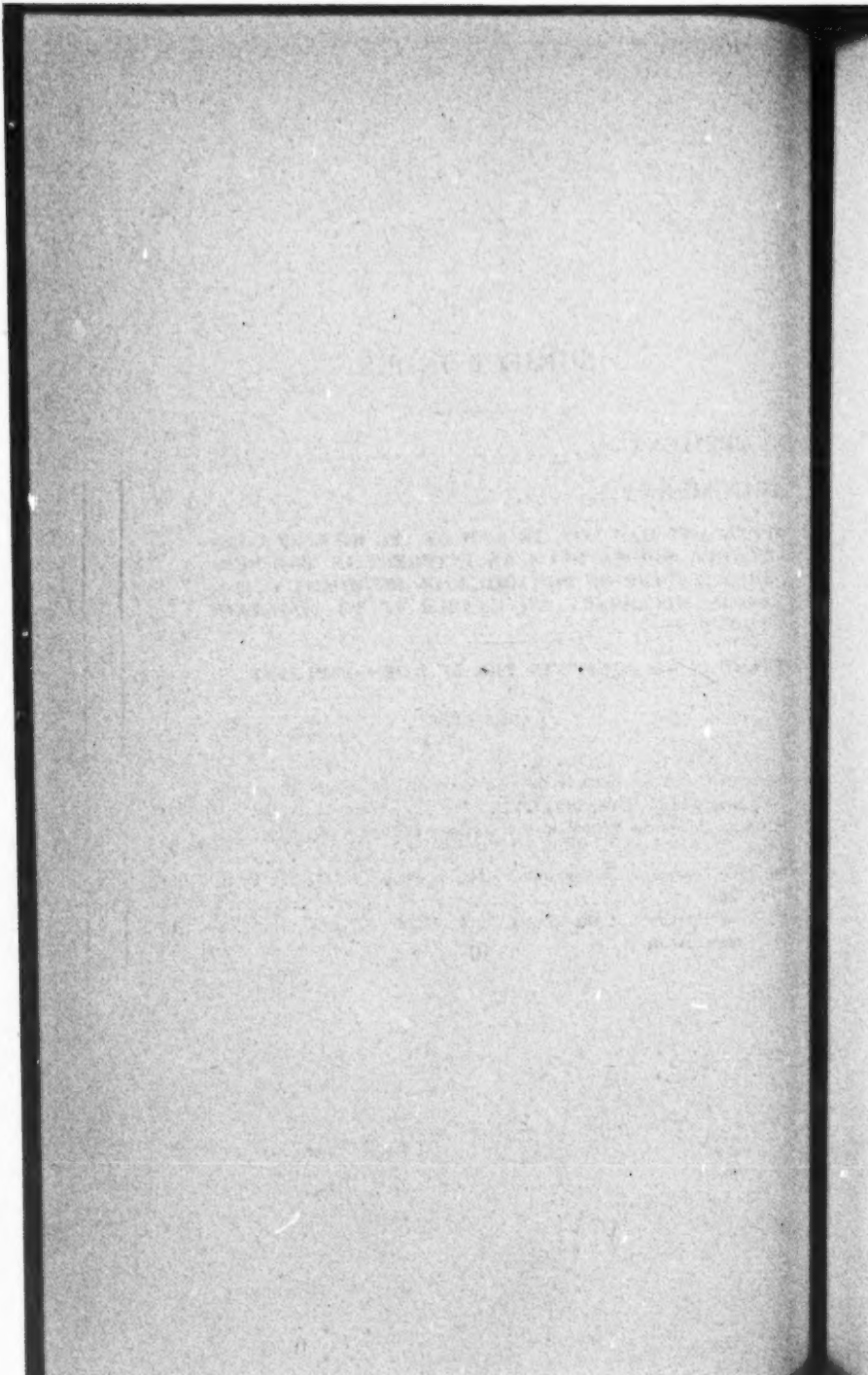
O

SUBJECT INDEX.

	Page.
STATEMENT	1-8
ARGUMENT	9-20
APPELLANT HAS NOT, IN AND BY ITS BILL OF COMPLAINT, SHOWN SUCH AN INTEREST IN THE SUBJECT MATTER OF THE ORDER OF FEBRUARY 11, 1922, AS IS NECESSARY TO ENABLE IT TO MAINTAIN THIS SUIT	9
THERE IS NO EQUITY IN THE BILL OF COMPLAINT	15

CASES CITED.

Clark v. *Kansas*, 196 U. S. 447	15
Interstate Commerce Commission v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 88. 109	14
Interstate Commerce Commission v. *Illinois Central R. R.*, 215 U. S. 452	17
Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547	17
Procter & Gamble v. *United States*, 225 U. S. 282, 297-298	16



SUBJECT INDEX

	Page
INTRODUCTORY STATEMENT	2-9
ARGUMENT	9
I. Order of the Interstate Commerce Commission can be enjoined only when it is (a) unconstitutional; (b) beyond the statutory authority of the Commission or (c) an arbitrary exercise of power which virtually transcends the authority conferred	9-10
II. The order is not a violation of the 5th Amendment of the Constitution	10
1. Penalty was assessed solely as penalty and not for compensation	10
2. Carriers are compensated for use of cars by regular demurrage charges	11
3. Bill does not show probability that any of appellant's cars will be used in reconsignment of lumber	12
III. The continuance of the penalty with the approval of the Interstate Commerce Commission would have in fact constituted a taking of property of the shippers without due process of law, in violation of the Constitution	12
1. Penalty system denied shipper right of hearing by competent tribunal for determination of responsibility for car detention	13
2. The penalty as assessed was special, partial and arbitrary and not operating on all alike	15
IV. The order is not beyond the statutory powers of the Commission	17
1. Act gives Commission jurisdiction over regulations and practices of carriers	18
2. Carriers recognized jurisdiction by filing tariffs covering penalty charge	22

Page

3. Denial of jurisdiction would permit carriers to circumvent regulatory powers of Commission exercised in public interest 23

V. The order is not an arbitrary exercise of power transcending authority conferred 24

1. Commission gave full hearing and report shows thorough consideration of evidence 24

2. Reason for imposition of penalty, i. e., emergency had passed 24

3. Finding of Commission as to car surplus and non-existence of emergency conclusive in absence of entire record before court 24

4. Order does not discriminate against any shipper for all are entitled to use reconsignment privilege without discrimination at same charge 25

5. Order does not lend itself to unfair competition for continuance of penalty had no relation to dishonest practices by any shipper 25

VI. Appellant's bill is without equity 26

1. Bill seeks to accomplish continuance of a penalty which equity abhors 26

2. Bill fails to allege facts showing any irreparable injury 29

3. Granting of injunction would operate oppressively on many shippers far outweighing any benefits secured by appellee 31

LIST OF CASES CITED

Page

Advances in Demurrage Charges, 25 I. C. C. 314, 315 ---------- 4, 11

Amelia Milling Co. v. Tenn. Coal Company, 123 Fed. 811---------- 32

Caldwell v. State of Texas, 141 U. S. 209, 11 Sup. Ct. Rep. 224, 226---------- 15

Charles v. City of Marion, 98 Fed. 166, 168------ 13

Chartiers Block Coal Co. v. Mellon, 152 Pa. State, 286, 25 Atl. 597---------- 31

Cigar Makers' International Assn. of America v. Goldberg, 72 N. J. L. 214; 70 L. R. A. 156----- 14

C. B. & Q. R. Co. v. Dockery, 195 Fed. 221----- 27, 28

Cruickshank v. Bidwell, 176 U. S. 73; 14 R. C. L. 332 ---------- 29

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, 439---------- 16

Detroit Traffic Association v. Lake Shore & Michigan Southern Railway Company, et al, 21 I. C. C. 257, 258, 259---------- 24

Ex Parte Stricker, 109 Fed. 145, 150---------- 13

French v. Barber Asphalt Paving Co., 21 Sup. Ct. Rep. 625, 626, 637---------- 16

Interstate Commerce Commission v. U. P. R. R. Co., 222 U. S. 541, 547---------- 10

Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, 469---------- 10

Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 91---------- 10

Kryptok Co. v. Stead Lens Co., 190 Fed. 767, 769-- 32

Leeper v. State of Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577, 579---------- 15

Page

Louisiana & Pine Bluff R. Co. v. U. S., 257 U. S. 114; 242 Sup. Ct. Rep. 25 ---- 25
Louisville School Board v. King, 107 S. W. 247, 15 L. R. A. (N. S.) 379 ---- 14
Lowry Lumber Co. v. Director General, 58 I. C. C. 113, 59 I. C. C. 90 ---- 3, 11
Mfrs. Railway Co. v. U. S., 246 U. S. 457, 481, 482 ---- 10
Miller v. Mansfield, 122 Mass. 260, 263 ---- 26
Minnesota Rate Cases, 230 U. S. 352, 419 ---- 30
Mountain Copper Co. v. U. S., 142 Fed. 625, 640 ---- 32
Parker v. Winnipiseogee Lake Cotton Co., 2 Black 545, 17 U. S. (L. ed.) 333, 14 R. C. L. 354 ---- 31
Pennsylvania v. Wheeling Bridge Co., 13 How. 518 31
Procter and Gamble v. U. S., 225 U. S. 282, 297 ---- 10
Reconsignment Case No. 3, 53 I. C. C. 455, 469 ---- 3, 11
Russell v. Farley, 105 U. S. 433, 438 ---- 32
Sheffield King Milling Company v. Domestic Science Baking Company, 95 Ohio 180; 150 N. E. 1014, 1016 ---- 28
Shelton v. Platt, 139 U. S. 591 ---- 29
Sullivan Lumber Co. v. Great Northern Ry. Co., 58 I. C. C. 110, 111 ---- 11
Simon v. Craft, 182 U. S. 427 ---- 13
Spiller v. Atchison, T. & S. F. Co., 253 U. S. 117, 125 ---- 25
Tayloe v. Sandiford, 7 Wheat. 13, 15 ---- 10, 26, 27, 29
Van Buren v. Digges, 11 How. 460 ---- 27
Watts v. Camors, 115 U. S. 353 ---- 27, 28
Wharton Steel Co. v. Director General, 59 I. C. C. 613, 615 ---- 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923

No. 91

EDWARD HINES YELLOW PINE TRUSTEES, EDWARD HINES, C. F. WIEHE AND L. L. BARTH, Trustees,
Appellants,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN WHOLESALE LUMBER ASSOCIATION,
Appellees.

Appeal From the District Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLEE

American Wholesale Lumber Association

This appellee, The American Wholesale Lumber Association, is an incorporated association of several hundred wholesale lumber dealers located throughout the United States and was the original complainant before the Interstate Commerce Commission in Docket 11818, in which proceeding the

order of the Commission now challenged by the appellant was issued. Intervention of this appellee was permitted on its motion and as of right under the provisions of Section 5 of the Commerce Court Act (36 Stat. L. 539) and the Urgent Deficiency Appropriation Act of October 22, 1913 (38 Stat. L. 219).

INTRODUCTORY STATEMENT

To enable the Court to understand the scope and purpose of this action, it is necessary to briefly outline the transportation methods involved.

For many years the carriers, as a part of their freight service, have extended to shippers what is known as the reconsignment privilege. This privilege is defined by the Commission as follows:

> "Reconsignment, as technically understood, is a privilege extended by carriers to shippers under which goods may be forwarded to a point other than their original destination, without removal from the car and at the through rate from the initial point to that of final delivery." (Detroit Traffic Association v. Lake Shore & Michigan Southern Railway Company et al, 21 I. C. C. 257-258.)

In other words, the carriers have designated a number of junction points known as reconsign-

ment points, to which shippers may ship their commodities with the right to divert to other points, as may suit their business needs at the through rate. This method of transportation is employed by shippers of farm products, fruits and vegetables, coal and numerous other commodities (Trans. 21). For the extra service placed on the carriers in handling such shipments at these reconsignment points, the carriers assess what is known as a reconsignment charge of $3.00 when reconsignment instructions are received prior to arrival of the car at the reconsignment point, and a charge of $7.00 when instructions are received after arrival of the car; these charges being generally uniform on all railroads and approved by the Commission as reasonable. (Trans. 30.) An allowance is made of twenty-four hours free time before any charge is made at the reconsignment point for storage and detention of the car. At the end of this twenty-four hour period, under the uniform demurrage charges mentioned in the Commission's report, (Trans. 17) a charge of $2.00 per day is assessed for the first four days and $5.00 per day for the fifth and each succeeding day. Lowry Lumber Co., v. Director General, 59 I. C. C. 90: Wharton Steel Co., v. Director General, 59 I. C. C. 613, 615. Demurrage charges have been held by the Commission to be both compensation for the carriers and also in part a penalty on the shipper. Reconsignment Case No. 3, 53 I. C. C. 455, 469; Lowry Lumber Co., v. Director General, 58 I. C. C. 113; Ad-

vances in Demurrage Charges, 25 I. C. C. 314, 315. Both the reconsignment charge and the demurrage charge are assessed on all shippers of all commodities.

On October 20, 1919, the Director General of Railroads imposed a penalty charge of $10.00 per day for each day or fraction thereof that cars loaded with lumber and other forest products were held for reconsignment beyond forty-eight hours after the hour at which free time began to run under the demurrage rules. The schedule providing for this penalty stated that it was "to prevent undue detention of equipment under the present emergency and is in addition to any existing storage or demurrage charge." (Trans. 16, 17.) This penalty remained in effect until March 13, 1922, when its further continuance was prohibited by the order of the Commission now before this Court.

The great importance of the reconsignment method of transportation to the producer, shipper and the general public, and the necessity of preserving it from restrictions which would tend to deprive the public of these advantages has been recognized by the Commission in various decisions.

In Detroit Traffic Association v. L. S. & M. S. Ry. Co., et al, 21 I. C. C. 257, 259, the Commission said:

> "The primary economic advantage of reconsignment is found in the increase in the fluidity and regularity of the movement of

commodities; there is an important elimination of economic waste in the reduction of the handling of goods between the producer and the consumer, celerity of movement is increased, the direction of commodities to the point of most active demand is facilitated. In other words, reconsignment increases the efficiency of transportation facilities in performing their most important function of bringing together supply and demand. The shipper of perishable products is enabled to divert his shipment from a market already overstocked, thus often converting a prospective loss into a gain; he is enabled to take advantage of his latest possible information as to market conditions. Similar advantages are seen in the movement of lumber and grain and other commodities of universal necessity."

This decision at considerable length outlines the great benefits of reconsignment to wholesalers, retailers, and the general public.

This method of transportation and distribution is extremely important in the lumber industry. There are two great competitive groups in the lumber industry. As the Commission finds in its report (Trans. 17) there was in 1918 one group of 785 large mills, constituting 4% of the total number of mills, but producing 60% of the total lumber and a second group of 21,781 small mills, con-

stituting 96% of the total number and 40% of the total production of lumber. The Commission described these two groups, i. e., the large mill of great resources, many maintaining their own sales organization and retail yards on the one hand, and the small mills selling almost entirely to the wholesalers on the other, in the following language (Trans. 17):

> "The large mills purchase large tracts of timber which will provide operations for a number of years. Such mills are equipped with modern machinery, have large yards, in most cases, where lumber can be graded and piled according to quality and size, and generally operate planing mills for the manufacture of siding, roofing, lining for railroad cars, etc. Some of them have their own sales organizations and maintain retail yards.
>
> "Generally the small mill is portable; it can be operated on one tract for a few years and then removed to another. It usually follows the large mill and cuts the small tracts of timber which have been left, or goes back over cut-over lands and small areas that the large mill could not reach. The small mill operator usually has only a small amount of capital, and, except for such stock as may be sold locally, disposes of his lumber largely through wholesalers,

who often advance money for the stumpage and sometimes for the pay roll for manufacturing. In such instances they retain title to the stumpage as security, and they have the mill load the lumber as early as possible.

"When loaded, the mill bills the lumber to the wholesaler at a reconsignment point and receives an advance against the shipping documents. Upon arrival of the car at the reconsignment point the local agent notifies the consignee. The tariffs permit one reconsignment on lumber and the demurrage rules allow 24 hours free time on cars held for reconsignment. As stated, the penalty charge does not begin to accrue until 48 hours after the hour at which free time begins to run. Upon receipt of the invoice from the mill the wholesaler lists the car in his transit list. These lists are issued tri-weekly, and are circulated among the trade in an effort to secure purchaser for the shipment. A corrected list giving information as to the cars sold is sent to the wholesaler's salesmen daily. If any of the unsold cars on the list have been reported as reaching the reconsignment point, the salesmen are instructed to give such cars immediate attention. Moreover, night telegrams are sent to salesmen and dealers in an effort to secure immediate sales."

The importance of the privilege to the small mills, wholesalers and retailers is shown by the following language from the Commission's decision (Trans. 29):

> "Complainants argue that the operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit. Complainants also assert that the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand, with less loss through fluctations in price, than if compelled to purchase directly from the mills at distant

points; and that with his limited capital the small retailer could not maintain a purchasing force to ascertain the financial rating and standing of small mills and, in the absence of the wholesaler upon whom he now relies for any contractual guaranty concerning the lumber, would be compelled to buy from the large mills or the large retailers at prices higher than prevail on transit lumber."

It is obvious that any heavy penalty imposed on the method of distribution followed by the thousands of small mills and wholesalers throughout the country must tend to restrict their ability to compete with appellants. That this is the real purpose of appellant's bill is made apparent by the allegations at the end of the third paragraph wherein he complains of the disastrous prices received for reconsigned lumber in the year 1921. It is respectfully submitted that the appeal in this case should be denied for the following reasons:

ARGUMENT

I. An order of the Interstate Commerce Commission can be enjoined only when it is (a) unconstitutional; (b) beyond the statutory authority of the Commission, or (c) an arbitrary exercise of power which virtually transcends the authority conferred, although it may not technically do so.

This principle has been repeatedly announced by this court in Procter and Gamble v. U. S., 225 U. S. 282, 297; Mfrs. Railway Co. v. U. S., 246 U. S. 457, 481, 482; Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 91; Interstate Commerce Commission v. U. P. R. R. Co., 222 U. S. 541, 547; Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, 469.

II. The order is not a violation of the Constitution.

The appellant alleges that the order is unconstitutional, but its own bill with attached exhibit of the Commission's decision and order clearly shows it is not. The ground on which the order is alleged to be unconstitutional is that the order compels the carrier to permit the use of its property without compensation, in violation of the 5th Amendment.

This contention has no basis in fact, for three reasons:

First: The penalty was assessed by the carriers solely as a penalty or fine for car detention to compel the release of equipment as the report of the Commission shows (Trans. 17). The carriers having denominated it a penalty, it would require very strong evidence to authorize the court to hold it not a penalty. (Tayloe v. Sandiford, 7 Wheat 13, 15.) The Commission in another case involving this penalty said:

> "This $10.00 penalty is in 'addition to any existing demurrage and storage charges' as a penalty to prevent undue detention of equipment." (Sullivan Lumber Co. v. Great Northern Ry. Co., 58 I. C. C. 110-111.)

The order, therefore, only enjoins the carrier from fining or penalizing a shipper, and has no relation to the compensation which the carrier receives for the use of the car.

Secondly: The carriers are compensated for the use of their cars while detained by the regular demurrage charges of $2.00 and $5.00 per day, which were assessed on shippers by reconsignment the same as upon all shippers. These demurrage charges have been approved by the commission on hearing and held to be, not only reasonable compensation for use of the equipment, but also in part penalty for its detention. Lowry Lumber Co. v. Director General, 58 I. C. C., 113; 59 I. C. C. 90. Reconsignment Case No. 3, 53 I. C. C. 455, 469; Advances in Demurrage Charges 25 I. C. C. 314, 315. These demurrage charges are moreover far in excess of the net revenue per car per day of the carriers, as shown by evidence submitted in this case recited by the Commission in the report (Trans. 20), which shows the net revenue per car per day for Class "I" carriers was 99c in 1917—76c in 1918—48c in 1919—31c in 1920, and 23c in January and February of 1921.

There can be no question whatsoever, therefore, that the carriers are amply compensated for the use of the cars when held at reconsignment point by the demurrage charges which were expressly created to provide compensation for the use of cars while detained. For any services which the carrier may have to render, in connection with the reconsignment of the carrier, the carrier is compensated by the reconsignment charges already described which have been fixed as reasonable compensation by the Commission.

Finally, the bill of the appellant does not even show a probability that any of its cars will be used in the reconsignment of lumber. The bill merely states the intention of the plaintiff to become a common carrier; it does not allege that there will be any lumber shippers on its fifty-mile track or that it intends to establish reconsignment points on its proposed line. It is, therefore, respectfully submitted that the appellant utterly fails to allege facts that even show a probability that his cars will be used for the reconsignment of lumber and that his own bill and exhibit show that if any car were so used he would receive just compensation for its use.

III. The continuance of the penalty, with the approval of the Interstate Commerce Commission, would have in fact constituted a taking of property of shippers without due process of law, in violation of the Constitution.

It is respectfully submitted that the Commission could not properly have approved the penal system thus created by the carriers without infringing on the constitutional rights of shippers for the following reasons:

First: The constitutional guarantee of due process of law assures the citizen due notice and hearing by a competent tribunal. Simon v. Craft, 182 U. S. 427; ex parte Stricker, 109 Fed. 145, 150; Charles v. City of Marion, 98 Fed. 166, 168.

Under the system of penalties here involved the carrier itself inflicts the penalty and collects it without notice or hearing before delivery of the freight. The penalty system was an attempt to build up a great private quasi criminal system throughout the country, under which the carriers were judge and jury, resolving all doubts against the shipper without hearing. The shipper could of course only get delivery of his goods by paying all transportation charges. The report of the Commission (Trans. 20, 24) shows that in many instances the penalty was assessed when the carriers were wholly or in part responsible for the detention. The Commission finds among other things—

(1) It frequently happened that a shipment was sold before it reached the reconsignment point, but that upon presenting an order for reconsignment the shipper was for the first time notified that the final destination was embargoed. (Trans. 20.)

(2) In some instances carriers accepted orders

for reconsignment, and when the car arrived at the reconsignment point then advised that the destination was embargoed. (Trans. 20.)

(3) In others, carriers held shipments at the reconsignment point on account of embargoes, when as a matter of fact the final destination was not embargoed. (Trans. 20.)

(4) That shipments were held up on account of embargoes established by the carriers, by reason of their own disability to handle traffic and the penalty charge collected. (Trans. 20.)

(5) That the penalty was assessed on Sundays and Legal Holidays. (Trans. 23.)

(6) That there were instances where there was considerable delay beyond the usual time in the movement of shipments from point of origin to the reconsignment point by the carrier, which resulted in cancellation of sales of lumber while the cars were in transit. (Trans. 24.)

In these and other instances cited in the Commission's report, the carriers being the judge of who was responsible for the car detention, arbitrarily assessed the penalty on the shipper. There was thus neither notice, nor hearing, nor a competent tribunal. It is respectfully submitted that the power does not reside in a government to confer authority on private parties to assess penalties, even by express statute, much less by government regulations. See Cigar Makers' International Assn. of America v. Goldberg, 72 N. J. L. 214; 70 L. R. A. 156; Louisville School Board v. King, 107

S. W. 247, 15 L. R. A. (N. S.) 379. In view of the fact that the administration of this penalty necessarily involved its assessment by a private interested party without proper hearing, it was the duty of the Commission, under the law, to order the removal of the penalty.

Secondly: The continuance of the penalty by order of the Commission, would not have constituted due process of law in that such penalty was special, partial and arbitrary, and not operating on all alike. This court has held that a statute or regulation which is arbitrary or partial in its application is unconstitutional. It has said:

> "And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. * * * The power of the state must be exerted within the limits of these principles and its exertion can not be sustained when special, partial and arbitrary." (Caldwell v. State of Texas, 141 U. S. 209, 11 Sup. Ct. Rep. 224, 226; see also Leeper v. State of Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577, 579.)

While the decisions involving arbitrary and class legislation have almost entirely involved state

legislation, and the application therefore of the 14th Amendment, the meaning of the phrase "due process of law" as used in both amendments is identical. French v. Barber Asphalt Paving Co., 21 Sup. Ct. Rep. 625, 626, 637.

To avoid being arbitrary and partial, a statute or regulation which applies only to one class "must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, 439.

It is respectfully submitted that the act, in respect to which the $10.00 penalty was imposed, was the detention of cars. The report of the Commission shows that there was detention of cars at reconsignment points on all of eighteen commodities, concerning which information was requested from the carriers and that there were not only commodities which detained more cars than lumber, but also commodities which were detained at reconsignment points an equal or longer period of time on the average (Trans. 21). The Commission's report covering a specified period shows 7505 cars of lumber held at reconsignment point and 30,579 cars of other commodities held in exactly the same manner at reconsignment points. (Trans. 22.) During the same period there were 34,199 cars of lumber detained for purposes other than reconsignment and 316,430 cars of other com-

modities held at other points for other purposes, such as loading and unloading. (Trans. 22.) Out of all the shippers of commodities detaining cars for any reason, out of all the shippers of many commodities detaining cars at reconsignment points, only the lumber shipper was assessed this penalty. The table appearing in the Commission's report (Trans. 22) shows lumber held for reconsignment responsible for less than three per cent of the car detention during the test period, yet only the lumber shipper reconsigning his shipment was assessed the penalty. It is respectfully submitted that, upon these facts, had the Commission continued this penalty in effect, such action by it as an administrative branch of the government would have constituted a deprivation of property without due process of law because such penalty was obviously special, partial and arbitrary in its application and not operating upon all alike who committed the act penalized, i. e., the detention of cars beyond free time, and would therefore violate the 5th Amendment.

IV. The order is not beyond the statutory powers of the Commission.

The Interstate Commerce Act as amended has conferred upon the Interstate Commerce Commission the most comprehensive powers of regulation and control of interstate carriers. This act, it is obvious from a cursory reading, vests in the Com-

mission jurisdiction over a regulation or practice such as the maintenance by the carriers of a penalty of this character.

In section 1, paragraph (3), the term "transportation," as used in the act, is defined as including—

> "* * * locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Paragraph (4) of section 1 reads as follows:

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those

entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (5) of the same section provides, in part, that—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

Paragraph (6) of section 1, also provides—

"It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, * * * the manner and method of presenting,

> marking, packing, and delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of the Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of the Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

In paragraphs (10) to (17) of section 1 of the Act, the Commission is also granted the most extensive powers over car service which is defined in paragraph (10) as including "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property." Paragraph (11) makes it the duty of carriers to observe just and reasonable rules, regulations, and practices with respect to car service, and prohibits as unlawful those which are unjust and unreasonable. Paragraph (14) authorizes the Commission, after hearing, to establish such reasonable rules, regulations and practices.

Section 6 of the Act provides among other things in paragraph (1) that tariff schedules which, under

the law, must be filed with the Commission, shall state—

> "* * * all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Paragraph (7) reads, in part—

> "* * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time * * *."

Under section 15, paragraph (1), it is provided that whenever, after full hearing, the Commission shall be of the opinion that—

> "* * * any individual or joint rate, fare, or charge * * * or * * * any individual or joint classification,

> regulation, or practice whatsoever of such carrier or carriers * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge * * * to be thereafter observed * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * * ."

and the Commission is specifically given the power to order the removal of the violation as was done in this case.

It is obvious that the imposition of the penalty is a "regulation" or "practice" of the carriers within the meaning of these several paragraphs, and that such regulation or practice can be enjoined by the Commission when it is "unjust" or "unreasonable." It is obvious that this penalty charge affects the "aggregate" of the "rates, fares or charges or the value of the service rendered" to the shipper. It was recognized by all the carriers that the penalty was within the jurisdiction of the Commission, as they all filed their tariffs promulgating the penalty with the Commission as required by sec-

tion 6, paragraph (1) of the Act. If the Commission did not have jurisdiction over a matter of this kind, the power of the Interstate Commerce Commission to regulate transportation would be largely defeated, for the carriers by assessing penalties for innumerable causes could in fact, add to the aggregate of the charges received for the transportation of goods, and completely defeat the regulatory power which has been vested in the Commission in the public interest, and would defeat the main purpose of the Act which was described in this Court in the Minnesota Rate Cases, 230 U. S. 352, 419, in the following language:

> "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this Court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

It is respectfully submitted, therefore, that the power exercised by the Commission in this case is clearly granted by the express wording of the statute.

V. The order is not an arbitrary exercise of power transcending the authority conferred, although technically not doing so.

There are no facts alleged in this case indicating arbitrary action by the Commission. The record shows the Commission gave a hearing to all parties interested, and the report of the Commission itself shows thorough consideration of the mass of evidence submitted. The Commission after reviewing the mass of evidence offered showing the unfair features of the penalty system, nevertheless, found that the assessment of such a penalty in an emergency when there was a great car shortage and congestion of cars in terminals was reasonable. The penalty was imposed by the carriers as the report shows as an emergency measure. The Commission then found that there was no existing emergency, but in fact, a large surplus of cars, so that the reason assigned by the carriers for the imposition of the penalty no longer existed, and held that there was no justification for the continued imposition of the penalty under such circumstances. The appellant assumes erroneously that there was no evidence in the records showing this large surplus of cars. This he has no right to do because the rule is now well established by the decisions of this Court, that the Court will not go into the question of whether or not there was evidence to support the findings and order unless the entire record before the Commission is placed be-

fore the Court. Spiller v. Atchison, T. & S. F. Co., 253 U. S. 117, 125; Louisiana & Pine Bluff R. Co. v. United States, 257 U. S. 114, 242 Sup. Ct. Rep. 25.

It is contended by the appellant that the order is arbitrary, because it creates an alleged unjust discrimination between the shipper at reconsignment point and a dealer maintaining a stock of goods in his yard. This is fallacious, because any shippers including such dealers have the right to use the reconsignment privilege in identically the same way for the same charges, but any shipper so doing must pay the reconsignment charges and the expensive demurrage charges which the dealer with his stock unloaded does not have to pay. The decision of the Commission shows a very small margin of profit made by reconsignment shippers, —so small in fact that demurrage charges will quickly consume them.

The appellant further contends that the order is arbitrary, because it compels the carrier to lend its equipment to unfair competition. While his innuendo directed at what the appellant admits in his bill to be an insignificant portion of the lumber industry is utterly irrelevant, it is difficult to see how the continuance of a $10.00 penalty would prevent a dishonest reconsignment shipper from padding his invoices or regrading his lumber, unless the effect of this penalty were to completely destroy the business of such shippers by making it impossible for them to ship by this method. Ob-

viously, such practices can be engaged in by any shipper by any method of transportation, and do not have the remotest relevancy to the order of the Commission directing the discontinuance of the penalty.

VI. The appellant's bill is without equity.

It is further respectfully submitted that there is no equity in the bill of appellant for the following reasons:

First: The bill seeks to accomplish the continuance of a penalty which is against equity. The prescription of this penalty in the tariffs of the carriers rendered it an implied provision of every contract of affreightment on which it was applicable. A provision in a tariff "being known to the plaintiff it is presumed in the absence of any evidence to the contrary that the parties contracted in reference to it. It enters into and forms a part of their contract." Miller v. Mansfield, 122 Mass. 260, 263.

This $10.00 penalty, as already pointed out, has been held by the Commission to be a penalty and it was so designated by the carriers and assessed in addition to the regular demurrage charges, which provided compensation for cars detained. Having thus been designated by the carriers themselves as a penalty, it comes within the following rule stated by the Supreme Court in Tayloe v. Sandiford, 7 Wheat 13, 15:

"Much stronger is the inference in the way of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would warrant the court in saying the parties were mistaken in the import of the terms they have employed."

The evidence is indisputable that this penalty is solely a penalty, a fine, or punishment imposed for the holding of cars and not in the slightest degree compensation for the use of the car. It is a well settled principle both at law and in equity that penalties prescribed in contracts are invalid and unenforceable. Tayloe v. Sandiford, 7 Wheat. 13; Watts v. Camors, 115 U. S. 353; Van Buren v. Digges, 11 How. 460; C., B. & Q. R. Co. v. Dockery, 195 Fed. 221. That equity abhors a penalty was at one time regarded as a maxim of equity, and it is still a recognized principle of equity that where a penalty is prescribed other than for compensation, equity will not only refuse to enforce the penalty, but will relieve against it. (21 C. J. 98.) This is particularly true where one party is in a position to dictate what the penalty shall be, as in the case of a carrier whose services

are indispensable to the business of the shipper. The courts will only permit fair compensation to the aggrieved party as damages for breach of contract, and penal provisions imposed by the contract will not be enforced. This principle is stated in Sheffield King Milling Company v. Domestic Science Baking Company, 95 Ohio 180; 150 N. E. 1014, 1016:

> "Compensation for damages sustained is the legitimate subject of such provisions, and where that subject is lost sight of and a penalty imposed they will not be given effect by the courts. Equity will enjoin the enforceability of inequitable and unjust provisions of this nature and courts of law will refuse to enforce them."

In Watts v. Camors, 115 U. S. 353, the court refused to enforce a penalty provision in a charter party providing a penal sum in case of breach equal to the estimated amount of the freight, holding that neither a court of equity nor a court of law would enforce such a provision. In C., B. & Q. R. Co. v. Dockery, 195 Fed. 221, in an action brought to recover a penalty named in a contract for failure to maintain a station at a specified place, the court held the same could not be recovered as it was intended as a penalty to insure performance. In Tayloe v. Sandiford, 7 Wheat. p. 13, the court refused to enforce a penalty of one thousand dollars

stipulated by the parties as payable in the event the construction of certain houses covered by the contract was not completed by a specified date. In this case we have presented not simply an isolated case of a penalty provision in a single contract as in these cases, but a great nation-wide system of penalties imposed by innumerable contracts of affreightment on thousands of shippers, the administration and assessment of the penalties being left to the carriers who were interested parties, a situation repugnant to elementary justice.

It is submitted, therefore, that the Commission sitting as it was in a quasi judicial capacity, could not properly repudiate the principles of law and equity recognized by the courts, by the issuance of an order holding such a penalty to be just and reasonable. And it is further respectfully submitted that this court should not take action which would have the effect of creating a vast private penal system over an important body of shippers of this country administered by the carriers who may themselves be responsible for the act for which the penalty is inflicted.

Second: Appellant's bill fails to allege facts showing any irreparable injury. A bill of complaint must allege the facts to enable the court to determine whether the injury will be irreparable and a mere general allegation that it will be of such a character is not sufficient. Shelton v. Platt, 139 U. S. 591; Cruickshank v. Bidwell, 176

U. S. 73, 20 Sup. Ct. Rep. 280. See also 14 R. C. L. 332, and numerous cases there cited. The appellant's bill in fact fails to make allegations, showing danger of any substantial injury to it flowing from the order of the Commission. Its bill is filed both in its capacity as a common carrier, and as a shipper.

No allegations showing probability of irreparable injury to it as a carrier appear, for the bill merely alleges that the appellant intends to become a common carrier. It does not allege that there are any shippers of lumber on its line. It does not allege that there are any reconsignment points on its line and as the penalty charge covered by the Commission's order applies only to reconsigned lumber shipments, it is difficult to imagine how the appellant, even if it were a common carrier, would ever be injured by the Commission's order.

Nor does the appellant make allegations showing any danger of irreparable injury to it as a shipper. The Commission's decision and order shows a heavy surplus of cars, and the order is predicated only upon the continuance of such surplus, so it is impossible to assume appellant will not be able to secure cars to ship its products. While the appellant also urges that certain dishonest practices, such as regrading and padding of invoices, may be employed in the reconsignment of a car, the reconsignment privilege was not before the Commission for adjudication, but only the le-

gality of the $10.00 penalty. Obviously, the order of the Commission preventing the imposition of this penalty, for the holding of cars has not the slightest relation or effect on the dishonest practices of any individuals in the lumber industry. A mere apprehension of future injury is not enough to warrant the issuance of an injunction. It must appear to the satisfaction of the court that such apprehension is well grounded, i. e., a reasonable probability that a real injury for which there is no adequate remedy at law will occur if the injunction be not granted. Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Parker v. Winnipiseogee Lake Cotton Co., 2 Black. 545, 17 U. S. (L. ed.) 333, 14 R. C. L., 354. It is submitted no reasonable probability of real injury is shown by the appellant.

Third: The granting of an injunction would operate oppressively on many shippers, far outweighing any benefits secured by appellant.

If there be any possible injury to the applicant in this situation, the court nevertheless is not bound to make a decree which will work greater injury than the wrong which it is asked to redress. Chartiers Block Coal Co. v. Mellon, 152 Pa. State 286; 25 Atl. 597. The comparative convenience or inconvenience of the parties from granting or withholding an injunction sought, should be considered and none should be granted if it would operate inequitably or contrary to the real justice

of the case. This court in Russell v. Farley, 105 U. S. 433, 438, said:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution." (See also Mountain Copper Co. v. U. S., 142 Fed. 625, 640; Amelia Milling Co. v. Tenn. Coal Co., 123 Fed. 811; Kryptok Co. v. Stead Lens. Co. 190 Fed. 767, 769.)

The appellant's bill, as already pointed out, alleges an injury which at best is trivial. The exhibit attached to plaintiff's bill, i. e., the Commission's decision (Trans. 26), on the other hand shows that in the month of September, 1920, alone, while the penalty was in effect, 1,574 cars of lumber were delayed beyond free time allowed for reconsignment and that the car days in excess of free time

that such cars were held for reconsignment was 5,705, which means that the penalty charges assessed during this month by the thirty-six carriers reporting, was $57,050,00. The appellant is thus put in the position where it is asking this Court to permit the continuance of a penalty which in the past has resulted in the penalization of shippers in an amount in excess of $50,000.00 in one month and which, if continued, would run up into huge totals without alleging facts in its bill which show in fact any injury to it.

It is therefore respectfully submitted that the complainant's bill is without equity—first, because it seeks the continuance of a penalty which a court of equity does not favor; secondly, because it fails to allege facts showing irreparable injury and finally, because it seeks to work oppressive inconvenience and injury to many shippers far outweighing any possible injury to the appellant.

Wherefore we respectfully pray that the Bill of Complaint submitted is without equity, does not show a cause of action and that the judgment of the lower court should be affirmed.

Respectfully submitted,

DAVIES & JONES,

JOSEPH E. DAVIES,
FRANKLIN D. JONES,
RAYMOND N. BEEBE,
Solicitors for Appellee,
AMERICAN WHOLESALE LUMBER ASSOCIATION.

on the grounds that it exceeded the power of the Commission and violated the rights of carriers under the Fifth Amendment. *Id.*
Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission.

Mr. William S. Bennet, with whom *Mr. Homer J. Smith* and *Mr. Edward W. McGrew* were on the brief, for appellants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Joseph E. Davies, with whom *Mr. Franklin D. Jones* and *Mr. Raymond N. Beebe* were on the brief, for American Wholesale Lumber Association, appellee, by special leave of Court.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought against the United States by an Illinois lumber concern in a federal court for Illinois to set aside as void an order entered by the Interstate Commerce Commission against carriers on February 11, 1922. The Commission and the American Wholesale Lumber Association—the petitioner in the proceedings before it—intervened in this suit as defendants. No carrier intervened. The plaintiffs had not been parties to the proceedings before the Commission, nor were they named in the order assailed. The United States moved to dismiss the bill on the ground that the plaintiffs had not shown such an interest in the subject matter as would entitle them to sue; and also for want of equity. The case was heard before three judges on application for a preliminary

injunction. It was agreed that the hearing should be treated as a final hearing. The court sustained the motion of the United States and entered a final decree dismissing the bill. That decree is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The essential facts are these: On October 20, 1919, the Director General of Railroads established a so-called penalty charge of $10 per car per day on lumber held at reconsignment points.[1] The declared purpose of the charge was "to prevent undue detention of equipment under the present emergency." The charge (in modified form) remained in force throughout the period of federal control; and thereafter it was continued by the carriers.

[1] The penalty was made payable for each day or fraction thereof; but only for the period that cars loaded with lumber or other forest products were held for reconsignment beyond 48 hours after the hour at which free time began to run under the car demurrage rules. By these rules 24 hours free time is allowed before any charge is made for storage and detention of the car at the reconsignment point. National Car Demurrage Rules (January, 1916) Rule 2, Sec. B, Par. 2. The penalty charge is declared to be in "addition to any existing demurrage and storage charges." *Sullivan Lumber Co.* v. *Great Northern Ry. Co.*, 58 I. C. C. 110, 111. The then existing demurrage charges were $2 a day per car for the first four days after expiration of the free time; and $5 per day for the fifth day and each day thereafter. Compare *Lowry Lumber Co.* v. *Director General*, 58 I. C. C. 113; 59 I. C. C. 90; *Wharton Steel Co.* v. *Director General*, 59 I. C. C. 613. Besides these demurrage charges there is a charge for the reconsignment privilege of $3 per car when reconsignment instructions are received at the reconsignment point prior to the arrival of the car, and a charge of $7 per car when the instructions are received after the arrival of the car. Compare *Reconsignment Case*, 47 I. C. C. 590; *Reconsignment Case No. 3*, 53 I. C. C. 455. Unlike the penalty charge, both demurrage charges and reconsignment charges are assessed upon shipments of all commodities. The demurrage charge is in part compensation to the carrier and in part a penalty to secure the release of equipment and tracks. *Demurrage Charges*, 25 I. C. C. 314, 315.

In September, 1920, the American Wholesale Lumber Association instituted proceedings before the Commission to secure cancellation of this charge as being unreasonable, unjustly discriminatory, unduly prejudicial and without warrant in law. The transit car privilege, permitting storage in cars for a short period at reconsignment points, is deemed an essential of the business by its members, who are largely jobbers and have no lumber yards. Protests against cancellation of the charge were filed by some associations of lumber manufacturers and dealers who customarily ship direct from the mills to their own lumber yards and have little occasion to use this reconsignment privilege. The imposition of the penalty charge was a direct benefit to them, since it subjected the jobbers, their competitors, to a severe handicap, and to that extent curbed the activities of these rivals. After extensive hearings the Commission held that it was within the power of the Director General, and of carriers, to establish penalty charges in order to prevent undue detention of equipment by shippers; that conditions existing at the time had warranted the establishment of a penalty charge; and that the charge then imposed had not been shown to be unreasonable. But the Commission also found that conditions had changed; that at the time of its decision there was a large surplus of service cars, which left the retention of the penalty charge without justification; and that while present conditions continue it is and will be unreasonable. An order was entered requiring carriers "to cease and desist . . . until further order of the Commission" from collecting the charge. The report stated "that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on carriers to publish penalty charges in the future if and when conditions warrant." *American Wholesale Lumber Association* v. *Director General*, 66 I. C. C. 393, 395, 408.

Plaintiffs are large manufacturers and dealers whose shipments are made mainly direct from the mills to destination. They claim that the order cancelling the penalty charge infringes their rights both as shipper and as prospective carrier. As shipper they claim to be injured because the jobbers are relieved from the handicap of the penalty charge; and also because longer detention of the cars at reconsignment points (which cancellation of the charge encourages) will subject shippers to the danger of car shortage, whenever general business again becomes active. Their claim of injury as prospective carrier is this: Plaintiffs are constructing in connection with a mill in Mississippi a local railroad which will soon be ready for operation. Cars acquired by them for use on their own railroad will naturally move to connecting lines and may then, in the absence of a deterring penalty charge, be used, like other cars, for temporary storage at reconsignment points; and the order of cancellation will encourage the use of plaintiff's cars for storage whereas their only legal use is for transportation. In this way the order entered not only prevents "the railroad from taking necessary steps to join the bulk of the lumber industry in suppressing the evil and dishonest practices" of jobbers, but prevents the railroads from charging an adequate rental (the penalty charge) for their equipment. The contention is that the order deprives railroads of the use of their property without due process of law in violation of the Fifth Amendment to the Federal Constitution to the detriment of plaintiffs who are interested in maintaining both a wholesome lumber business and effective transportation.

The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffen-*

baugh, 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which they were made is not before the Court. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate, may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief. As the plaintiffs

143 Syllabus.

do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge or the power of the Commission to order its cancellation.

Affirmed.

UNITED STATES EX REL. BILOKUMSKY *v.* TOD

EDWARD HINES YELLOW PINE TRUSTEES ET AL. *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND AMERICAN WHOLESALE LUMBER ASSOCIATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 91. Argued October 18, 19, 1923.—Decided November 12, 1923.

1. To maintain a suit to set aside an order of the Interstate Commerce Commission upon the ground that it exceeded the powers of the Commission, it is not essential that a plaintiff should have been a party to the proceedings before the Commission in which the order was made. P. 147.
2. But to maintain such a suit the plaintiff must show that the order alleged to be void subjects him to actual or threatened legal injury. P. 148.
3. Where the interest shown by a group of lumber manufacturers in attacking an order of the Commission, which abolished a penalty charge on lumber held at reconsignment points, was in the handicap which the charge imposed on competing jobbers, and in the possibility that its removal might divert the cars of carriers, including those of their own projected railroad, from transportation to storage uses,—*held*, that they had no standing to sue to set the order aside,